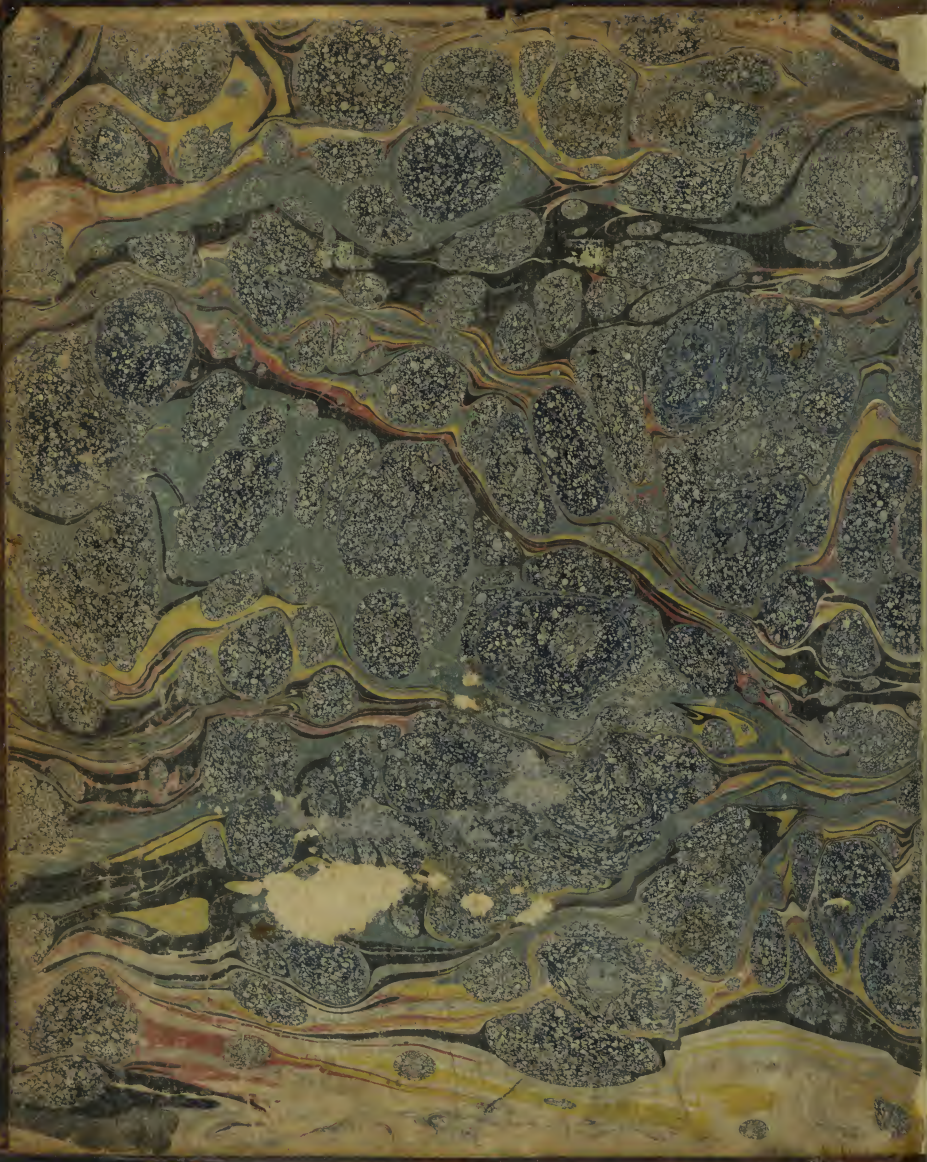

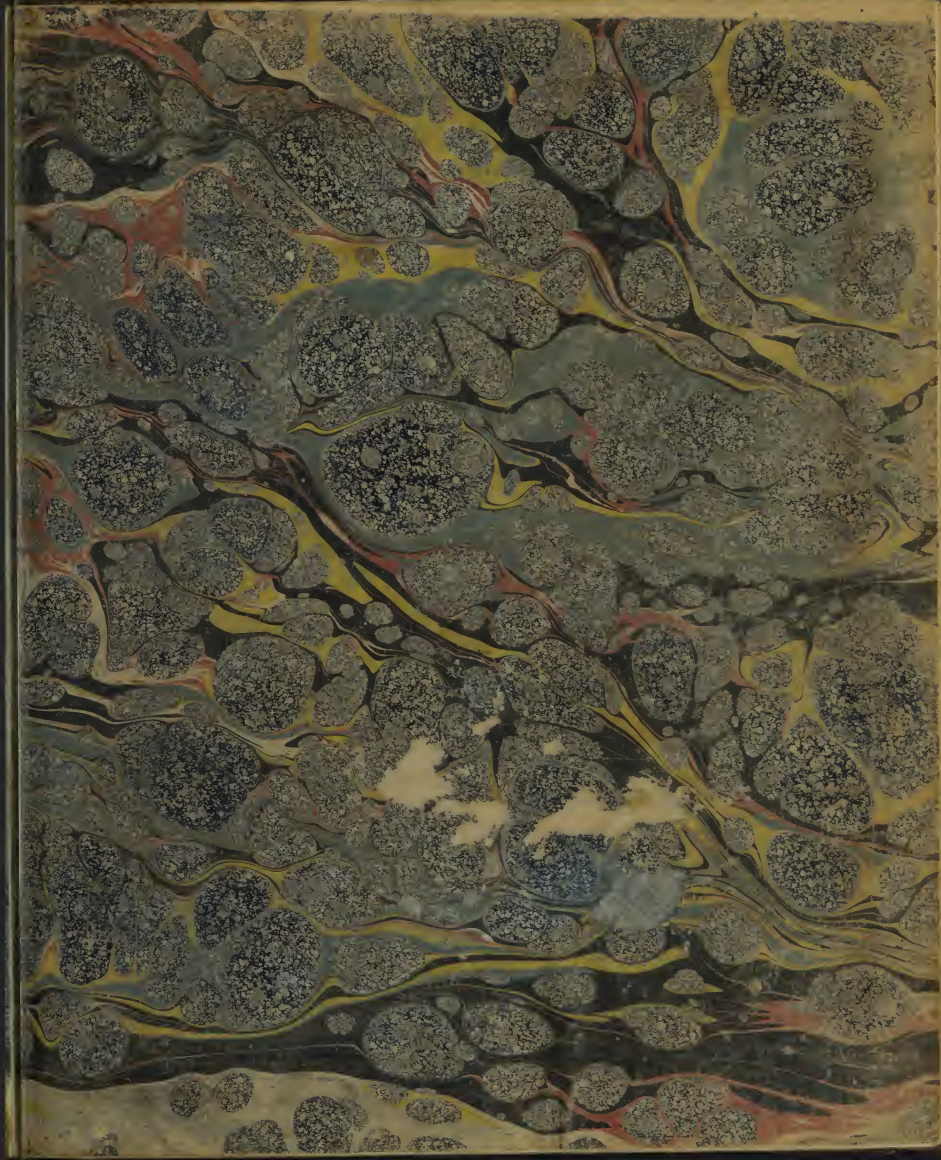

John Douglas Fraser 26th July 1813

A Bhere

Real Property

Real Property.

Mr Reeve previously to his entering particularly into the minutia of the Doctrine of real property, proposes to give an historical delineation of its rise and progress to the present time —

It is difficult to define real as contradistinguished from personal property — Real property is said to be fixed permanent and immoveable: Personal to be moveable and such as may attend a man's person wherever he goes: and such as is included under the comprehensive term Chattels —

It is not true however that all personal property is moveable, for the property enjoyed under a lease for years is or immoveable or any other altho' personal —

Nor is real property always possessed of the qualities of visibility and tangibility for an Equity of Redemption is real property —

But again real property is defined to be such as descends to the Heir: personal such as goes to the Exr — A life estate is real property it is a freehold not of inheritance but still cannot descend to the heir —

Here the enquiry naturally occurs, can an estate to A. for the life of B. descend to the heirs of A. B. being alive? It cannot because it is an estate to A only

Real Property

and not to his heirs — It cannot go to the Ex^tor because it is an estate of freehold — It cannot go to the donor, for he granted for the life of B. who is still living. It was then open or in a state of nature to the first ~~of~~ occupant until the stat. Charles 2. directed the Ex^tor to sell it for the benefit of the heirs —

There are but three estates known to the Eng. law which have certain unalterable qualities and incidents. These are. I. Estates in fee simple II. Estates tail and III Estates for life — under which are included estates for the life of the donee, pur autre vie, and most commonly estates resting on contingencies.

Real estate includes Hereditaments, corporeal & incorporeal —

Corporeal hereditaments, include only lands according to Sir Ed. Coke: for in legal signification land embraces all the buildings and erections of every kind upon it, usque ad cœlum and all mines and productions below it ad inferum.

Incorporeal hereditaments, are neither visible nor tangible, are not the objects of perception, altho' their effects may be so — An incorporeal hereditament is one issuing out of any thing corporate or substantial whether real or personal; or annexed to: or exercisable within, the same: as an annuity, right

Real Property—

of Common, right of Office and the like—

But there is an other species of estate distinct from those already mentioned which (it would seem) are neither real nor personal: ~~or annexed to or exercisable within the same~~ This is an estate at Will. This does not and cannot go to the heir or Ext.: and on the death of either of the parties must be at an end.

To make a real estate of inheritance words of inheritance are necessary which in Eng. are "Heirs".

This is not ~~all~~ necessary to render personal property inheritable and arises entirely from the peculiar idea attached to real property by the feudal system—

Originally Estates owned by the feudal chieftains were never granted for a longer time than the will of the donor — The next step was the granting of estates for years: and at last as a great stretch of favor estates for life were granted, which seemed to be the *ne plus ultra* of feudal liberality — Hence an estate given to J. S. not mentioned to be for a determinate time, was construed to be for life — At last as tenants became anxious that their estates should be descendible to their posterity it became necessary to use some word which should import their descendible quality and distinguish them from estates for life The term "Heirs" was adopted and has continued

By the terms stems of this line was meant only stems of the body of persons - here of reputable fund could not go to any person but only to the issue of the body - the condition of the ground was probably respecting as there was - the meaning was that the stem must be of the blood of the first person after - of the blood what was then meant by it - generally when they meant by it - the terms in blood every of persons here were minded that the full compensation might be barred only put - during they period no alienation of land

to be used to their time —

Under the Eng. law then Real Property is governed by laws altogether different from those which regulated it under the Grecian and Roman governments — The gothic chiefs who governed conquered the ~~roth~~ southern and western empires, first granted out estates in land on the condition of the fi=delity of the grantee. These grantees as has been remark=ed first held the estate at will then for years: next for life, and eventually descendable to their "Heirs" —

The word "heirs included every direct descen=dant of the grantee: who of course must be of the blood of the first purchaser or acquirer, for at that time no collateral relation could be the heir of the grantee.

When there were lineal descendants the eldest ~~son~~ took the estate as Heir; and at his decease the next brother inherited as heir to the father, provided the lineal succession failed —

During all this time there was no such thing as alienation of land: that is buying and selling it at a price. But when the crusades rendered money necessary, a small portion of the real estate of the proprietors was permit=ted to be sold: Afterwards one half was customarily disposed of and eventually by the statute Quia emptores

By a fetch of law estate became defeasible to any heir or estate
not [illegible]

they was vested by the great Barons as declared in of the
greatness they therefore introduced into these grounds the
merely terms of the body to prevent it being sold for debts they
proposed it would go on from year after to year not to be sold but
alienated and found was it sold not with the [illegible] of
the courts that was a fee simple conditional upon condition that
your heirs sheuld of your body issue may claim what you please with
it if not it goes back again to grantor. [illegible] and
and it defeated [illegible] they then attempted to frame a
statute on the [illegible] statute [illegible] it was found wise always
and by fraud defeated [illegible] the tendency of wills of land
the use could be demised the statute [illegible] [illegible] as feeling
uses followed by statute of 32 & 34

Real Property

18 Ed. I. persons holding real property were empowered to dispose of the whole of it —

Still lands could not be devised by will until the stat. of Wills in 32 27 Hen. VIII. made all lands devisable. Previously to that stat. however, the use of lands could be devised; which was a practice favored and enforced by courts of Chancery.

~~The~~ In consequence of ~~this demising power~~ the stat. of uses 27 Hen. VIII. was ~~made which declared that by to~~ a transfer of the use of the land the same being ~~whatever~~ ~~the~~ and as land was not devisable ~~should have the land in fee simple~~ — there could be no devise of the use

When by the stat Quia emptores lands became alienable the descent was confined to the blood of the first purchaser —

There are several incidents or qualities attached to and inseperable from an estate in fee simple —

I. It is necessarily from its nature alienable II. It is descendable to the Heirs general of the purchaser, which includes collateral as well as lineal heirs: and excludes only those in the ascending line for the weighty reason (perhaps) assigned by an ancient author "ne pondera rerum ~~a~~ ert"! The "heirs general" does not mean every child alike, but has a reference to the laws of descent.

[illegible] lands which forfeited by act of parliament [illegible]
[illegible] - forfeitable for treason
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] - [illegible] [illegible] [illegible]
[illegible] [illegible] forfeitable for treason [illegible] for felony

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III. The wife of a man seized in fee simple is entitled to dower—

IV. And if the wife is seized of land the Husband shall have Curtesy—

V. The owner of Lands in fee simple may commit Waste.

Formerly in Eng. words both of perpetuity and descent were necessary to create an estate in fee simple. Now a grant to A and his "heirs" will create such an estate. "What particular Heirs" are necessary is regulated by the law of descents; and the word "Heirs" is only descriptive of the quantity and duration of the estate and not the mode in which it shall descend—

The best definition that can be given of an estate in fee simple is "an estate to a man and his heirs"—

In Com. estates are holden in allodium and Wh. supposes would not escheat unless by special provision of Statute—

A fee simple may be created by will without the necessary words to convey such an estate by grant, if it be the obvious intention of the Testator to create such an estate— Deeds must be construed literally strictly, and technically, Wills according to the intention of the Testator— This difference is attributable to the more enlarged and—

*Where an estate is given to A. & his male heirs or to A. & his female heirs —

The following states have by statute expressly ratified enclosures &c —

In Rhode Island the owner may convey such estate in fee

In Massachusetts the owner may convey such estate in fee

In Connecticut the ~~first~~ grantee holds it during his life and then it descends a fee simple to his heirs

In New York enclosures made since the revolution are fee simple estates

In New Jersey all enclosures that had been made previous to August 1784 if they had passed and descended were in the hands of the owner a fee simple and all made after that time must pass and descend and then would be fee simple estates in the hands of the owner

In Maryland the landowner had may convey his ~~estate~~ estate as a fee simple estate —

In Georgia ~~also~~ by a statute of 1792 all estates holden as fee land estates are declared to be fee simple estates and all estates thereafter made by words that evently an enclosure are to be fee simple estates

In all the ~~states~~ states except Vermont & South Carolina ~~the states~~ the statutes make the owner to devise as appurtenant the words are all persons having lands to convey devise then in ~~the~~ the other those all persons having fee simple estates

liberal mode of thinking which prevailed at the time of enacting the stat. of Wills when the human mind began to burst the shackles of technical strictness by which it had been enchained.

In a devise "all my estate" the words "all my estate" "all my effects" and even "all I am worth" will convey an estate in fee simple — But there is in Eng. one curious exception for where a man devises an estate (describing it per se) to A. it will be only an estate for life. This would not be so in Con. and this says Mr Reeve is the ~~at~~ only difference in the construction of wills between the Eng. and Con. law.

The intention of the devisor altho' it is that by which all difficulties and obscurities are elucidated, is never to be regarded when against law, As where there is a devise to Sisters or *Brothers exclusively: this is such an estate as the law knows nothing of, neither fee simple fee tail, for life, contingent, or conditional,

III. The next estate known to the Eng. law is an Estate Tail: But before I treat particularly of this, some observations shall be made on a species of estate not now in existence but which is the parent of estates tail — This was called a fee conditional at common law — This had its

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rise from the proud aristocratic spirit of the feudal chiefs, who could not endure the idea of seeing their estates alienated from their families — Hence they introduced grants to their children and the heirs of their bodies. This or it restrained alienation could not be a fee simple. The Judges who were not at that time well affected to the cobbler construed this or an estate necessarily descendable in the family only in which it was limited: but as notwithstanding, depending on the condition or contingency of their being children and when the condition did not happen: that is when there was no children, the estate was spent and a fee simple ~~vested~~ returned to ~~in~~ the donor or his heirs. This construction was fatal to the scheme of those who introduced the practise, and that their favorite project should not be entirely defeated they introduced the statute "De donis ~~conditionalibus~~ conditionibus filis" Ed. ~~III~~ III. which restrained the estate to descend in the family of the grantee "in infinitum". This could not be explained or construed away: It was a sore grievance and at length a remedy for it was discovered which is termed docking an entailment — This is accomplished by a friendly suit. John Stiles wishes to sell his estate in tail to Tom Poker, John tells Tom to sue him for the land and he will make no defence, Tom, accor=

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-dingly commences suit; John in court vouches the crier, who knows nothing of the matter, A nominal sum is recovered against the crier; a judgment goes out against the defendant and gives the Pltf: a regular and complete title to the land. This is a common recovery

Estates tail are either in tail general or special — An estate in tail general is to "D. S. and the heirs of his body begotten" and is so called because however often the donee in tail be married; his issue in general by all and every such marriage is in successive order capable of inheriting the estate tail fee formam doni; The succession of heirs is regulated by the laws of descent, collateral relatives are entirely excluded —

An estate in tail special, is an estate restrained to certain particular heirs of the Donee's body and not inheritable generally As an estate to "John S. and his heirs on his present wife Mary to be lawfully begotten"

Estates tail are farther diversified by several distinctions in such entails for they may be in tail male or in tail female; as if lands be given to D. S. and the heirs male of his body: this is an estate tail male general — But if to D. S. and the heirs male of his body on his present wife Mary to be begotten this would be an estate

in tail male special and so by substituting the word "female" it would in the above cases be an estate in tail female general or special.

If there are no such heirs and the entailment is not docked by a common recovery; the estate being spent the fee will revert to the donor.

In case of an intail male, the heirs female can never inherit, nor any derived from them: And "e converso" of an estate ~~tail~~ intail female. Co. Lit. 20.

Thus if the donee in tail male had a daughter, who dies leaving a son; such grandson not being able to deduce his descent from the donee by heirs male cannot inherit no can any of his descendents; and vice versa.

The principal incidents ~~in~~ to an estate tail under the stat. of West. 2d are as follow.

I. The tenant in tail may commit waste.

II. The wife of a tenant in tail shall have her dower.

III. The husband of a tenant in tail may have Curtesy.

IV. An estate tail may be barred by fine and recovery; and by a lineal warranty descending with assets to the Heir.

V. Estates tail may be destroyed by docking the entailment. In the 12 year of Edw. IV. Common recoveries were first holden to be a sufficient bar to an estate tail

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In Con. there is a stat. creating entailments: it has not altered the Eng. doctrine only in limitation or duration of the estate: It remains an estate tail in the donee but becomes a fee simple in his children; It is nearly allied in many instances to a fee conditional at com. law. It was enacted here to provide for families, and restrict spendthrifts from wasting the inheritance of their children —

It has been said that the Con. stat. vests a fee simple in the children ~~of the grantee~~ as soon as they are born The words of the stat. are that "the estate tail shall vest in fee simple in the children of the grantee" and it has been contended that the grantee by the words takes only an estate for life — Mr. Reeve contradicts this for the words of the stat. give an "estate tail" having reference to entail estates in Eng. For a proper construction then we must resort to the Eng. books: Were this not done we should be entirely "out at sea" in our legal proceedings. — The fact is that the grantee takes an estate "per formam doni" that is an estate tail which entail the donee cannot dock for that would destroy the effect which the Legislature intended the stat. to produce: It has been decided that the wife shall have dower in this estate: which is decisive of the question —

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Estates in fee simple, and fee tail are the only estates which can descend, the ~~former~~ latter "per formam doni" is limited to a particular mode; but both are governed by the laws of descent.

As the word heirs is discriptive of the quantity or duration of the estate and not of the mode of descent; the eldest son regularly inherits.

All estates of inheritence are also freehold estates; but all estates of freehold are not of inheritance: As estates for life of any kind or estates depending on a contingency which may last for life. Here we see that one may have the freehold and ~~the~~ an other the fee simple.

<u>As to the operation of Deeds.</u> The words lands, houses, out houses, barns orchards, waters, ponds, lakes, heaths, furze, moors, &c &c. are very often tho' very unnecessarily used in <u>deeds</u>. They were probably first introduced tho' the avarice of the clerks who were handsomely feed for writing. By the term "<u>land</u>" passes every thing, and the word "<u>farm</u>" when the land is properly described will convey as well as "<u>land</u>".

A man may convey land and except a <u>fee simple</u> ~~in it~~ or any ~~an~~ other estate in the wood, timber, buildings &c. In fact he may except any thing on the land and convey

it to an other, or retain it himself. If a house is excepted it will be a lease of the land whereon it stands as long as it stands — 8 Co. 137.

There is one species of property of an incorporeal nature which appears to be personal in every other respect than that it descends to the Heir, and not to the Exr.s, I mean an Annuity, which is a claim upon the person of an other — Co. Lit. 2.

Supposing an estate be given to A. and his male heirs forever, a fee simple passes — for tho' there was clearly an intention to limit to male descendents only, yet if the male issue fail the female shall take — for the law knows of no such estate as that intended to be limited, the intention of the grantor is an illegal one, and of course void; and the words of perpetuity and inheritance in the grant render it a fee simple —

Any words in a Devise which make clear the intention of the Devisor, will convey just such an estate as was intended: In devises no words of perpetuity or inheritance are necessary to vest a fee simple —

Suppose an estate were given by deed to A. & B. and Heirs, here for want of certainty as to what heirs were meant their was construed to be an estate for life. It would have been otherwise in a will — Co. Lit. 8.

If a grant is made to A. and his successors then will be only an estate for life —

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But in Corporations the word successors, answers the same purpose as the word heirs in grants to individuals and if it be a sole corporation either successors or heirs are absolutely necessary to be inserted: But <u>aliter</u> as to aggregate corpora=tions; for a grant to a corporation aggregate will convey a fee simple without words of succession —

There are some exceptions to the general rule that the word "heirs" is necessary to convey a fee

1st Persons holding estates in coparcenary where one wish=es to convey her portion to an other no words of inheritance are ~~necessary~~ requisite. 2d So in case of corporations, as has been mentioned 3 So also in Devises <u>ut ante</u> —

Before devises were ~~necessary~~ customary it was a maxim that a fee simple ~~for the first grant conveyed to the grantee~~ could not be limited upon a fee simple; for the first grant conveyed to the grantee all the estate which the grantor owned. This Mr Rawle thinks ~~savour~~ savours too much of technical reasoning —

By wills however a new estate was created, which was termed an "Executory devise" of which more will be said hereafter; by which a fee simple may be limited upon a fee simple —

By an executory devise a fee simple might be gi=ven to commence <u>in futuro</u> on the performance of some con=

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=dition by the grantee –

A fee simple Conditional – nearly answers the same pur=pose as an estate in fee limited on a fee. This is called a base or qualified fee, having some condition – annexed to it, on the determination of which the estate must end – Co. Lit. 427. a 127.

A conditional fee at Com. Law was a fee restrained to some particular heirs in exclusion of others as to the heirs of a man's body; the male heirs of a man's body be –

This was termed a conditional fee, by reason of the condition expressed or implied in it, that if the donee died without such particular issue or heirs, it should revert to the donor, but if he should have such heirs it would remain to the donee –

An Entail may be created by devise without the par=ticular words necessary in Deeds –

A tenant in tail may sell his interest in the es=tate but cannot affect the heirs, for if he dispose of the estate for his own life it will be good against him: But the estate tail must descend unincumbered to the heirs.

If a tenant in tail convey an estate in fee simple such conveyance is voidable by the heirs. ~~In case of book~~ ~~ussey to be a stat. Fee~~

Suppose in this country a tenant in fee simple

ca. 8/20

die without heirs, and there is no statute what ~~not~~ shall become of the estate. Mr Reeve supposes it would go to the first occupant as lands here are strictly allodial: and even the word "fee" as used to designate our estates is ~~are~~ improper.

Tenant in tail after possibility of issue extinct.

This estate seems to form a middle link between estates tail and for life. The entailment must be special as "to the heirs of J. S. on his present wife Mary to be begotten" and the possibility of such heirs must be extinct that is in the case put Mary must ~~die~~ be dead without issue or leaving no issue —

In every respect except that he is not liable for waste the tenant is as tenant for life, But the reversioner cannot sue him for waste — 4 Co. 56.

Estates for Life —

These are of two kinds 1st Conventional such as are created by the act of the parties themselves: and 2d Legal such as are created by construction and operation of Law. —

The former species comprises Leases made to

one for his own life, or for the life of any other person or for more lives than one: and all estates depending on conditions or contingencies which may by possibility endure for life.

Any lease for a determinate time tho' for 1000 y. is only an estate for years –

The estates for life created by operation of law are

I. Tenant in tail after possibility of issue extinct –

II. Tenant in Dower; and

III. Tenant by the Curtesy –

The incidents to a Conventional estate, and one created by operation of law are the same 1st The tenant may unless restrained by special agreement take reasonable Estovers, or bote; but cannot commit waste –

2d The tenant shall not be prejudiced by any sudden determination of the estate: for if a tenant for life sow the land and die the emblements belong to his Ex^tors; "nemo actus Dei neminem facit injuriam" –

So if a man be tenant "per autre vie" and "cestuy que vie" or he for whose life the estate is holden die after corn sown and before harvest; the tenant shall have the emblements – The ~~rule~~ rule is the same if the estate be ~~the same~~ determined by the act of the law –

But <u>aliter</u> if determined by the act of the ten-

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=ant himself—

34. Under tenants, or lessees of tenants for life, have all the privileges of their lessors, and their additional one, that when the estate is determined by the act of the tenant for life, the under tenant shall have the emblements—

Of Estates for life created by operation of Law—

First of Dower. The intention of dower is to provide a suitable maintenance for the wife of a deceased husband—and in some respects it differs from any other estate—

By the Eng. law, the wife at the death of the hus=band, has an estate for ~~the life of~~ her life of ~~all~~ 1/3 of all the lands of which the husband was seised in fee simple or fee tail, during the coverture—

In Con. the wife is entitled to dower ~~only~~ in the lands only of which the husband died seised—

To entitle the wife to dower the estate must be such an one as that if the husband had issue by the wife it might have inherited—

Therefore an estate in special tail might not in some cases be subject to dower—Of this it can only be said "Ita lex scripta est"—

Co. Litt. 61.

Co. Litt. 62.

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The right of the wife to dower created great embarrassments in the alienation of estates, being an encumbrance of which a sale could not divest them. To remedy this in England alienations by fine and common recovery were used which was a judicial conveyance by the wife and husband jointly—

This dower estate has some peculiar privileges which are not incident to other estates; as

1st. An exemption from paying the debts of the husband for if a man die insolvent, having in his possession a large real estate the wife will be endowed and the creditors cannot deprive her of it—

2d. Dower cannot be devised away from the wife by will; nor taken from her by the act of the law—

But in personal property the husband can at any time by disposing of it bar the wife of any part of it—

A woman can be a lawful wife and yet can not be endowed; as an alien wife — Co Lit. 131. or 31. — For altho' an alien may hold property if it is not taken from him, which it is always liable to be, yet it can never descend from him—

A woman divorced a vinculo matrimonij cannot be endowed; and this proceeds upon the ground that she never was a lawful wife—

If a wife is under 9 years of age she cannot be endowed

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=ed.

A wife may bar her dower by an act of her own, which is an elopement with an adulterer and the husband not reconciled to her. Elopement itself according to our idea ~~with~~ of the word will not be a bar. Mr. Greene supposes that the ~~prime original meaning~~ word "elopement" itself originally ~~meant~~ signified the going off of a wife with an adulterer.

Where our statutes have not varied them we have almost uniformly adopted the English rules, of estates in fee simple, fee tail, dower &c.

A seizen in law of the husband is the same for secur=ing the wife's dower, as where he is seized in fact, ~~the wife can not help it~~.

In case of joint tenancy the wife cannot be endow=ed because of the "jus accrescendi" or right of survivorship to one joint tenant in case of the death of the other.

Estates in jointenancy cannot be dowered because the title is ambulatory or as Finch expresses it, the agility of the title or right of survivorship is so great, that it vests before the dowzee can have a title.

A wife is also entitled to dower in an incorporeal estate as a right of common, a fishery &c but this is real property. She ~~has no~~ cannot be endowed of an office.

1 Atk. 561—

Co. L. 96.
4 Co. 9—

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A wife may be barred of her dower by a jointure, which is a provision made by the husband for the wife in lieu of her dower. 1st This must to be good be done before marriage for then the woman is "sui juris" capable of judging of the competency of the jointure and is not under the coercion of her husband; for if it was not then made before marriage she might be barred of her dower by an insufficient jointure.

2.d It must be a competent livelihood by which is meant a livelihood proportionate to the husband's estate.

3.d It must be taken immediately on the death of the husband.

4.th It must be of real estate, because real estate is more permanent and cannot be easily spent.

5.th This conveyance must be made to her not to trustees for her.

If all these requisites are complied with, it will be a complete bar to dower. A jointure at Com. law was no bar but is made so by stat. 27 H. VIII.

To make a marriage settlement it need not be of real estate therefore marriage settlements cannot bar dower.

But jointures are frequently made after marriage these if accepted by the wife will bar her dower at Com. law. So a jointure by devise but it is still altogether at ~~the election~~

+Co.4.

at her election to accept or not, for she is under no obligation but may take her dower at Com. Law but cannot have both.

It is holden in the Eng reports that if a husband devises legacies (which consist only in personal property) however large or important, they may not be taken as dower unless it be expressed to be in lieu of dower and received as such.

In Con. & New York, people have gotten an idea that they must express in their wills these words "I devise 1/3 of my property to my wife Mary to hold during her life" not recalling that (or rather not knowing) the wife will have the dower at all events. This then is not expressed to be as dower or in lieu of dower, but Mr K. thinks it would be improper and unjust to give her 1/3 more as dower, when the testator intended what he devised in this as her dower; this is certainly a queer question, but it is supposed that when the matter is brought before courts by some more lawyer like woman it will be decided that she shall have but the 1/3 devised to her.

Dower is lost by attainder of treason; a jointure is not because it is vested before marriage and cannot be afterwards affected by any act of the husband.

As to the wife's remedy for her dower; she may remain 40 days after the husbands death, in his house during which time (which is called her quarantine) it is the heirs duty

to set out her duly dower. If he does not do it from want of a will, or if he is too young to do it, or if he does set it out, and the wife is not pleased with it, she may make her application to the court for her court of dower.

But in ~~the~~ case ~~of~~ the jointure proves not to be her husbands and she is only of part of it, she may relinquish it, and take her dower at law.

Wherein the doctrine of Dower differs in Con. from that in Eng.—

In Con. the widow can be endowed of only one third of what her husband actually died seized of — A man ~~th~~ wishing then to defraud his wife of her dower ~~ma~~ may convey away his property before his death; but to remedy this as much as possible, it has been determined that if the property be conveyed away in contemplation of death the wife shall have her dower — But these conveyances have not been considered as deeds, but as wills because made in contemplation of death; for an instrument of writing thus made is not the less a will because it does not begin in common form — That this is not a new idea introduced by Con. courts vide 2 Ver. 431. 440.

In Con a woman is entitled to dower even in

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case of a divorce a vinculo matrimonii, if she is not the party in fault — In Con. you will recollect that divorces are for supervenient causes —

In Con. a woman cannot forfeit by the treason of her husband —

It has been made a question whether from our stat. we had not here a jointure different from that in Eng. Mr. Reeve determines in the negative —

So much may suffice to be said concerning dower and we will proceed to the consideration of

Estates held by the curtesy of Eng.

A curtesy estate is that where a man marries a woman seized of lands of inheritance, and has by her a child or children born alive — which issue could have inherited; now upon her death, the husband shall hold her lands during life as tenant by the curtesy of Eng.

The regulations concerning tenants by the curtesy are positive regulations, for which there is no apparent reason.

The difference between dower and curtesy is as follows — 1st. In dower the wife is entitled to 1/3 of all the husband's property; in curtesy the husband has all the property of which the wife was seized —

Co. Lit. 24.

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2d In order to take dower there is no necessity for issue. in courtesy there must be issue born alive.

3d The wife may have dower of lands of which the husband was seized in law — to entitle the husband to courtesy the wife must have been seized in fact.

<u>Where they agree</u> — They agree in this 1st that such is a <u>provision made</u>, the one for the wife and the other for the husband. 2d In both there must be death. In dower of the ~~wife~~ husband; In courtesy of the ~~husband~~ wife. 3d In both, the estate held must have been such as one that the issue could have inherited. But cannot issue always inherit when the estate is an estate of inheritance? No. It has already been said that an estate in tail special may be so made as to prevent the inheritance of issue; In such estate therefore the wife ~~can~~ cannot have dower or the husband courtesy.

There has been an opinion entertained in Con. that the Eng. doctrine of courtesy could not be adopted altogether here because we had no stat. adopting it. But this notion was erroneous — Concerning ~~this~~ Dower we have a stat. in Con. made in affirmance of the Eng. doctrine with the variations ~~before~~ ante.

There have in Eng. a great variety of customs grown up among which the two ~~principally~~ principal over one Gavel Kind and (I presume) Burough English. both of which cover over much of Eng. Gavel Kind prevails in the county of Kent and is where

3 P. Wms. 229.
1 Atk. 603.
3 P. Wms. 69.

3 Atk. 695.
1 Ves. 298.

all the sons inherit together; and here the husband ~~on~~ is entitled to courtesy without issue — On this account tenant by the courtesy here, has been said to be the same as courtesy ~~as courtesy~~ in Gavelkind — In this particular they may be alike, but in every other respect they in Con. adopted Com. law courtesy —

It has been a great question whether a husband could have a courtesy in a trust estate of his wife? There are many trust estates — An equity of redemption is one and the husband can have courtesy in it — The wife cannot in Eng. be endowed of any trust estate, but in Con. she may — Both in Eng. and Con. the husband may have courtesy in such an estate —

But can the husband be tenant ~~be~~ in courtesy of a sole and seperate estate to the use of the wife and her heirs? It is clear he can have no ~~such~~ right to such an estate during coverture; for it is completely within her power to sell it, or do as she pleased with it — It has been determined that as he could not be seized of such an estate, he can have no courtesy in it —

An other estate for life which grows out of the wife's estate and not granted to her sole and seperate use in the estate which the husband has in such property during coverture — They have in this a joint estate, but the husband has exclusively the Usufruct, which is anything produced on the land by ~~they labor~~ his labor, and which does not appertain to the freehold or inheritance — It is

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in fact the crop; the annual produce - It being entitled to the usufruct he may have an action in his own name for any injury done to it - tho' the wife is very often joined - But if an injury is done to the inheritance or freehold, which is the grass, land, or tree, she must join her husband in an action, because the injury in this case is done to her -

The foregoing estates are all created by operation of law.

Of Conventional Estates.

Conventional estates or estates created by ~~law~~ the act of ~~law~~ the parties, are such as are given to a man by some instrument expressly for life - they are sometimes for the life of another person, and sometimes for more lives than one -

It should be recollected that the incidents inseperable from a fee simple are 1st Alienation, 2 Being descendable to the heirs general 3rd Dower of the wife 4th Courtesy of the husband. 5th Being disputishable for waste -

<u>To a fee tail</u>. 1st Being disputishable for waste 2d Dower of the wife 3d Courtesy of the husband 4th That they can be docked - 5th of not docked descendable to heirs of the body in general and yet to common law

<u>To an estate for life</u> - 1st That the tenant may take upon him the land reasonable estovers or boter. 2d That he

Co. Lith. Pa.

shall not be prejudiced by any sudden determination of the estate 3d. A third incident relates to under tenants or lessees for they have greater indulgences than their lessors —

No tenant for life has a right to commit waste except there is an express right granted in the lease to commit waste —

The stat. of Gon. (which has been made the subject of much ridicule) declares that the tenant in dower must leave the estate in good repair &c as if any satisfaction could be had of the wife when dead if she did not there leave it, but the liability of having the estate taken from her and given to the heir to repair, but then it must be repaired, object of the stat. appears clearly to subject her to ~~damages~~ unless she kept it in good repair during life —

These tenants all have a right to take off the land what is necessary for ~~food~~ wood, or for carrying on the farm; which in the old Saxon language is sufficient plough bote, hay bote, and fire bote.

It has been observed that any estate resting on a contingency which may last for life, will be esteemed an estate for life, and have its qualities; but no estate for a determinate period can be a life estate, nor possess its qualities —

It is a maxim of the english law that no estate of freehold can be made to commence in futuro — This ~~on~~

is broken in upon by no other conveyance than that of will. But why cannot this be done? All conveyances were formerly by livery of seisin, because they did not then know how to write. A sale could not then be perpetuated except by this matter of notoriety. Since writing has become customary the delivery of a deed would as completely convey a title as twig and turf. Altho' the reason of this rule has ceased yet the rule itself remains, that an estate of freehold if it passes at all must pass eo instanti that the deed is delivered. But by a stat. in Con. it is declared that no estate in fee simple, fee tail, for life, or any less estate, can be passed by deed or will unless given to a person in being or to the immediate descendants of a person in being. Of course an estate can be made to commence in futuro, for it can be given to the unborn child of one who is in being.

In executory devises the longest time in which it can be given is for life or lives in being and 21 years & for 10 months afterwards.

In Eng. an estate granted to A. for life, remainder to B. here the estate does not commence in futuro, but passes out of the grantor both to A. & B. at the time of the grant to A.; to shew the truth of this if there is any waste committed during the time of A., B. the remainder man or reversioner must sue, as the case may be.

Co. Set. 42.
1 Roll & 44.
4 Mod. 179–

Plow. 140–

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This doctrine applies to incorporeal hereditaments, in which a real estate can be had —

The operation of the stat. of ~~powers and purposes~~ uses an=thorizes a sale without livery of seisin —

Estates "per auter vie" or for the life of an other, stand upon the same footing, only in the case of the death of the ten=ant per auter vie. In this case who could take the estate, for the grantor could not take it, because the grant had not expired? It could not escheat because it is a rule that part of an estate cannot escheat — The heir could not take it because there are no words of descent — Neither could the Exr. take for it was real estate — It was then hereditas jacens open as in a state of nature to the first occupant, until by statute it was treated as personal property, and made assets in the hands of the Executor — It was also not devisable by will —

There is one principle in Eng. in cases for es=tates for life, which we have not adopted which is "that the alienation by a tenant, of a greater estate than his own, was a forfeiture of his estate" But here the feudal idea does not govern, and such a sale will convey all the estate that the tenant had — Therefore it was no forfeiture —

In Eng. if the reversioner joined with the tenant it would be considered as a remuneration and a complete

conveyance of all their estate —

Something of the word heirs — It is a rule in Shelley's case 1 Co. Rep. 104. about which there is no difference of opinion that if ~~a man~~ an estate is given "to a man for life", and in the same instrument the estate "to his heirs" here notwithstanding the intention of the grantor, it will be a fee simple in the grantee or ~~dis~~ devisee — if it is given or devised to the heirs of his body it will be an estate tail — The words for his life are construed as nothing and this according to the feodal idea — The word heirs heirs in this case will be a word of limitation (i.e. it will mean the heirs in general) and not a word of purchase or descriptio personæ a word of description — In all this there is no disagreement Mr B. it will be recollected has spoken of agreements executed and not executory —

Let us proceed one step farther and we will find the great point, which has required the skill & called forth the ingenuity of the greatest legal characters in Europe —

The construction given to a will or deed couched in the words preceding, being manifestly contrary to the intention of the grantor or devisor, it has been concluded ~~in the~~ that altho' technics when alone in a grant must be construed

in a legal way; yet if there are other words besides merely the words to A for life and to the heirs of his body indicative of an evident meaning that it should vest only an estate for life in the grantee, that it should be considered as a word of description or purchase and not as a word of limitation.

This is evidently in favor of the intention of the testator or grantor. But on the contrary it is said that there can be no construction different from the known principles of law, and that it is an acknowledged principle, that whenever the word "heirs" is used inseparably ~~vest~~ vest a fee simple, if anything because heirs is the word by which a fee simple must be made. That this operative legal word must and will control the intention of the party conveying the estate.

Mr Reeve is of opinion with those who are for laying hold of all the words and construing them according to the intention of the testator. We all know that where there are no technics used the construction must be according to the intention of the devisor or grantor and that any estate could be given if not contrary to the principles of law. Could the grantor ~~then~~ then give an estate for life? He could to do what was legal, because the word heirs ~~in was used~~ happened to be used? Mr. R. conceives that all depends upon the nature of the estate given, and not

4 Burr. 2579.

1 Cor. of. op. 282. 319. Doug. 323. Atk. Ver —

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upon the words made use of.

(a) The case of Bagshaw and Spencer was of this nature. An estate was given to Thomas Bagshaw for life, and for the purpose of preventing a forfeiture, it was then given to trustees to preserve for his heirs. Here there were other words used to shew the intention of the grantor; and according to such intention it was determined that Bagshaw had an estate only for life. Here the heir took as described in the instrument. this Mr B. conceives to have been a very important case. There is also much important doctrine disclosed in the case of Perin and Blake. 1 Vol. Cas. of opinions 319. 283. and very many cases in point cited. Mansfield, Hardwicke & Butler were for observing the intention of the devisor. Is the intention to be thrown out of the question, and certain technicies to be observed? or is the intention whenever it is a legal one, ought certainly to be regarded. A man may so explain his intention as to control technicies. Powell. Fearne & Yates are for observing technicies and in the cases of Bradshaw & Spencer or Cod. Coulson & Codson they are opposed to Mansfield, Hardwicke & Butler. This part of question has been adgitated in Con. the reasons of the judges were in favor of the intention but the point was not settled.

Emblements.

There is a species of Amphibious property sometimes real &

A View of Mortgages the estate conveyable to the defeated
by condition performed or defeated depends on general proof
it may be in fee or for a term of years - cases are
fee considered if not proved uses absolutely at law may
be redeemed the equity of real estate defeated may
be charge - the mortgage of personal matters fall
passes in as to the a more than of remain of the debt

sometimes personal, called emblements, which may be defined to be anything which is the annual production of labor – Such things as are raised by the industry of the ~~tenant~~ tenant – In short the emblements are the crops raised on the lands held – These emblements adhere to the freehold as well as trees or grass, but yet they are not always real property –

They will pass by a grant of the freehold; therefore in that point of view they will be considered as real property – Theft cannot be committed on them (except severed from the freehold) in that point of view they are also considered as real property. But in case of the death of the tenant they will not descend to the heir but go to the Exr. and in this point of view they are considered as personal property –

It is a general rule that the emblements will not pass by a devise. If therefore a devise is made of the freehold sometime before the death of the tenant say 4 or 10 years, the emblements clearly will not pass, because they were not had in view at the time of making the devise – But suppose the devise of the freehold is made to day to pass instanter, the question is, will the emblements pass? this is unsettled –

When a tenant in fee simple dies, or a tenant in ~~fee tail dies~~ tail dies the emblements will go to the ~~heir~~ Exr.

But what will become of them in case that the

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tenant for life dies? They will go to the Exr. as assets in his hands, otherwise if the tenant for life determines his estate by his own act—

Where a man sows whether he be tenant for life, tenant ~~for~~ at will or tenant for years, having ~~know~~ no knowledge of the time, at which his estate will determine; he shall in case of a deter=mination have the emblements, and free ingress, egress, and regress, to get them off the estate. If he dies the emblements will go to the Exr. as personal property— But it will be remarked, that it will be invariably the case, that where the tenant puts an end to the estate by his own act, he will have no right to the emblements and of course they cannot go to the Exr.—

Mr. Reeve having finished his remarks on freehold estates he will now consider estates less than freehold which are estates or ~~leases~~

Leases for years — Estates at Will & Estates at Suff.

I. "An estate or lease for years is a contract for the possession of lands and tenements for some determinate period" This estate altho' had in lands is not real property but a chattel interest— It goes to the Exr. upon the ~~tenant~~ death of the tenant, as other chattels and is applied to the same use altho' it may be ten times as valuable, as a life estate, which is a freehold. If an estate

(2)

But in our stat. there is no exception and all leases must be in writing, tho' some have supposed that a lease for one year only might be by parol because our stat. which requires leases to be recorded says that all leases for a longer time than a year must be in writing and recorded which seems to imply that for a less time they need not be in writing but it must be remembered that the stat. of frauds had declared that all leases must be in writing, and that the other stat. was not made to repeal that but only to require the recording of leases that were for a longer period than one year, it was the same as if the stat. had said, all leases must be in writing and all for a longer period than one year must be ~~in writing~~ recorded — —

20. Lt. 45.

is leased only for one month ~~and is an estate for years~~ it is an estate for years as much as if 1000 years —

Every estate which may continue for life, as an estate during coverture, during widowhood, or until married are estates for life — But what distinguishes leases ~~for years~~ for years, from the estates is that the former begins at a determinate of time and end at a determinate time — Upon principles of com. law an estate of freehold cannot be made to commence in futuro; Estates for years may be made to commence at any time — In making a lease for years if no time is mentioned it will commence on the delivery of the ~~lead~~ lease —

The words generally used to create this estate are "Demise" "lease" "let to farm" &c — But these terms are by no means necessary — Any word which will show a certain ~~in~~ intention of the lessor will convey just such an ~~other~~ estate for years as is ~~expected~~ expressed, or was intended —

At com. law it is said, that leases for years might be made by parol; but by the stat. of frauds and perjuries there can be no interest created by any parol agreement; except with the exceptions there made — (a) ~~But by the construction given to this stat. by some, a lease by parol would be good but Mr Kent thinks that even before the statute of F. & Pr.~~

leases, to have been good, should have been in writing, and he thinks that the true construction of the stat. is this, that all leases whether for a long or a short ~~time~~ term should have been in writing, but that if a lease is made for less than a year it is unnecessary to record it.—

If however a man does make a lease by parol and in consequence thereof a tenant enters it will not be void as to all purposes, for it will be a licence to save him from an action of trespass, for his entry will be lawful.—

Again if a parol lease is made with reservation of rent, and entry in consequence thereof, the rent shall be paid, but not on the ground of the lease being a good one, and the tenant thereby acquired an interest in the land; but on the ground of the tenant's receiving profit, or advantage, for which he ought to pay.—

WHO CAN MAKE LEASES.—? Tenant in fee simple can make a lease for any time he pleases because the whole property resides in him.—

But a tenant in tail can make no lease that will be binding on his heirs, except by the stat. 32 & 33 Hen. VIII which enables the tenant in tail to lease for 3 lives <u>in esse</u>, which might last longer than his life, and so long as it did last the heirs would be bound thereby.—

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Can tenant per autre vie make a lease? Mr Reeve supposes upon principle he may, but he knows of no case determining the point.

Lessee for years is liable for waste, either actual or permissive, if it is such as the law deems to be waste. But this lessee cannot be sued in trespass because he came lawfully into possession.

With respect to the manner in which long leases in Canada acted upon, many rules cannot be laid down. But Mr Reeve says that the judges have for 30 years (or leases for 999 years) considered such leases as freehold or real estate. Of such a lease the wife has been endowed and the husband entitled to courtesy. A man being lessee under one of those long leases has been deemed a freeholder: None of which things could have been done unless the property had been considered as real.

A lessee ~~may~~ for years may under lease, or assign his whole term.

III. What is called an estate at will, Mr Reeve considers as no estate at all, and yet something must be said about it. It is not real property because it cannot descend, It is not an estate for life because the tenant may be turned off instanter; It is not an estate for years, because it is for no determinate period and depends upon the whim and caprice of both parties.

It is in fact only a licence from the owner permitting

Co. Lit. 55.
Moor. 775.

2 Bl. C. 146.

Cro. El. 784.
Co. Lit. 57a.
11

Real Property

a man to enter and then it is held at the will of each party. What right then does he acquire by an entry? 1st He acquires the right (if it can be called one) of not being a trespasser 2d. Whatever is the product of his labour he is entitled to. He is in fact entitled to the emblements and if the owner wishes to determine the estate before the emblements are reaped he may do so, but he must allow the tenant free ingress, egress, and regress to cut and carry away the profits. But if after the determination by the lessor, the tenant enters enters for the purpose of tilling the land &c, he will be a trespasser. The lessor shall never so far take advantage of his own wrong as to send off the tenant and keep the emblements to himself, for it was his own act to suffer the tenant to enter.

A tenancy at will, may be determined 1st By notice of the lessor. 2 By any ~~act~~ act of the lessor inconsistent with the occupancy of the tenant at will. You have before seen what will be the consequence of a determination of this estate. This tenant at will is not liable for waste but if he does any injury to the estate which would have been considered waste in an other tenant, it will be a trespass in ~~law~~ him. This licence is personal and he must therefore by no means cede it. If he mines lease it will be a determination of his estate

III. Tenant by Sufferance. is where one leases an estate for years & after the time has expired the lessee continues on the ground the Lr. knowing it. Mr. K says that this estate is allied in every particular to a tenancy at will.

Of Estates upon Condition.

An estate upon condition, is one which depends upon some uncertain event, by which it may be created, enlarged or defeated. Co. Lit. 201. 2 Bl. 152.

Estates upon condition are of two sorts I. Estates upon conditions ~~expressed~~ implied and II. Estates upon condition expressed. Under the head of these are included estates upon pledge.

I. Estates upon condition implied are such as have some condition annexed to them from the very essence and nature of the thing itself. As the grant to a man of an office &c. Here it is implied on his part that the office shall be faithfully performed, and implied on the part of the grantee also that he shall do no act incompatible with the nature of the estate granted, as the employing a stranger &c. Co. Lit. 215. 2 Bl. 153.

II. Estates upon condition expressed are such as have express qualifications annexed to them, which by the estates are to commence, be enlarged or defeated. Co. Lit. 201.

Express conditions are divided into estates upon condition precedent, and subsequent. The former is where the event on condition must actually happen before the estate can vest or be enlarged as an estate granted to A. upon his marriage to B. provided he goes to York &c.

Lit. tenr. 325.
Co. Litt. 207.

7 Co. 117.
Co. Litt. 201.

Estates upon Condition.

An estate upon condition subsequent is where the estate is vested, but upon the happening of some event or condition may be defeated – As where an estate is granted to A. upon the condition of a payment of rent be annually; here the estate is vested. But when the estate is granted upon the condition of a payment of rent, unless the grantor actually makes a demand of it at the day due, he cannot ever after recover it – The condition is here construed strictly against the grantor –

There is a distinction to be observed between an Express condition in deed, and a Limitation or condition in law –

Where an estate from the nature of it cannot possibly remain or continue after the event takes place the qualification is called a limitation – That is where it is not necessary for the grantor, to do any act in order to revest the estate.

The words "so long" "while" "until" are words of limitation –

But if the qualification annexed is a condition in deed, the estate does not cease immediately or of course after the happening of the condition – Entry or claim is necessary by the grantor, or his heirs, to vest the estate and this is called a condition in deed –

2 Bl. 155.
10 Co. 41.
Lit. tenr. 340.
347. 3 T. R. 411.

2 Bl. 155.
9 Mod. 202.
Cro. El. 205.

2 T. R. 138.
4 Do. 60. 61.
2 Atk. 219.

2 T. R. 140.
425 –

Estates upon Condition.

The words "provided" "upon condition" "so that" &c are terms of condition –

The distinction between a condition and a limitation, altho' it would seem merely verbal yet it is very important –

It is not universally true that these words of condition as "provided" "so that" &c operate as words of Condition; for it is a rule, that where an estate is granted over to a third person or persons, these very words will be construed as words of limitation –

The reason is because the grantor or his heirs may neglect to take advantage of the non performance of the condition; and therefore Ex^ors shall not be prejudiced by the negligence of others –

It has lately been settled that an express condition that the lessee of a term shall not assign it, is good.

If therefore he should make an assignment of it will be a forfeiture of the term –

But if a lease is made to A. and his Ex^tors with a condition that his Ex^tors shall not assign – it is a question whether they may not assign, without a forfeiture of the estate –

The better opinion however seems to be that they may assign, such condition notwithstanding –

Lessee of Jones covenant not to assign
Grant

5 T. R. 641-

8 T. R. 61.
2 T. R. 133.
6 Do. 684-

Co. Lit. 206.
2 Bl. 217.
1 Pow. 2. 261.
2 - 2 Bl. 157.

Estates upon Condition.

If one holding an estate for life or years under a deed which is void, and he attempts to assign under such ineffectual instrument, this attempt to assign will not destroy his estate.

It has been settled that if there is a lease made with proviso that the term shall not be subject to bankruptcy it will be good.

It seems also that it may not be taken under an execution by the creditors of the lessee.

If an express condition subsequent annexed to an estate, be impossible at the time of its creation, it vests the estate intended to be given upon condition in the lessee or grantee, for such a condition is void.

So also if the condition becomes impossible by the act of God, or by the act of the grantor, the estate becomes absolute, for the party to whom the estate is granted, shall not suffer by the ~~[illegible]~~ laches of an other, when he has done ~~[illegible]~~ what he can.

So also if the condition be against law or repugnant to the nature of the estate granted it will be illegal and void, and therefore an absolute estate will vest.

Here the dictates of sound policy are followed, for there never should be a temptation laid to commit an illegal act.

Co. Litt. 206.

Pow. C. 54.
Barnadis.
9 C.

Estates upon Condition.

The preceding cases refer to conditions subsequent but as to conditions precedent there is a material difference. For in conditions precedent, no title can possibly vest at all, whether the condition be unlawful or impossible. If it is impossible it clearly cannot, because the creation of the estate primarily depends upon the impossibility of the condition, happening. If it is unlawful the estate can never vest, because the law can never recognize a title which is repugnant to itself.

The performance of a condition either precedent or subsequent is matter in pais, and of course provable by parol evidence.

Under the head of conditions subsequent are included Estates held in Pledge or Mortgages and Living Pledges — which will now be considered.

Mortgages.

Mortgages.

Estates held in pledge are of two kinds, the first of which is called *Vivum vadium*, or living pledge which is an estate granted by a debtor to his creditor to hold until the debt is paid or satisfied – This species of pledge is called a living pledge because the thing pledged survives the debt and when it is discharged the property reverts to the grantor – Bro. M. 3.4. Co. 2. 205. 2 Bl. 157.

The second kind of pledge is called *Mortuum vadium*, or dead pledge and is an estate granted by a debtor to his creditor, upon condition that if the grantor pays the debt on a certain day, the estate shall become void, in one of three ways. 1st That the Mortgagor shall enter or 2d That the Mortgagee reconvey or 3d That the Mortgagee shall disclaim all interest in the premises – Bro. 4. Lit. Lect. 332. Co. Lit. 205. 2 Bl. 157.

It has been observed that conditions either *subsequent* or *precedent* being matter *in fact* may be proved by parol evidence – So in Mortgages the extinguishment of the debt for which the estate is given is provable by parol testimony and the estate thereupon reverts; therefore a clause or provision for a reconveyance is merely a *cautionary* step –

It is called a mortgage, because if the Mortgagor fails to make the payment, the estate as to him is gone for

Mr. Gould remarks that when the question is asked how many kinds of mortgages there are, it is generally assumed that there are two viz. vad. & mor. vad. This is he says is incorrect for to say that a living pledge is a mortgage is as absurd as to say that a living man is a ded man. A reference to the derivation of the word will show this.

Pow. 5.

Ch. 15 K. Pow. 14. 66. 79. Ch. 255.

Lt. text. 335. 338.

Mortgages.

=ven at Law. 2 Bl. 158. Pow. 4. 13. 168. 1 T. R. 756.

A mortgage then is substantially, an estate pledged by a ~~creditor~~ debtor to a creditor as a security for a debt. The word "mortgage" then refers to the estate pledged and not to the deed, as is often understood. The deed then should be called a mortgage deed instead of a mortgage.

The debtor or grantor is called the mortgagor. The creditor or grantee is called the Mortgagee.

Every mortgage then is an estate pledged upon condi=tion, and this condition is usually called a Defeasance, be=cause its office is to defeat the estate granted to the Mortgagee.

There is no precise technical form indispensable in making a mortgage deed. The defeasance may be a ~~technical~~ distinct instrument, it may be in the body of the deed, or it may be annexed to it, or indorsed upon it; for it is a rule that two in=struments executed at the same time, and referring to the same cause, make but one contract.

As soon as the estate is created, the Mortgagee may take possession tho' he is liable to be dispossessed. The usual and almost universal practice is for the Mortgagor to remain in possession until the condition is broken.

There is a distinction at Com. law between a grant made to secure a gift, a gratuity, and one made to secure an antecedent

Co. Litt. 200.
2 Co. 213. 221.

Prec. y. Co. Litt.
221. 2. Eq.
ca. ab. 314

2 Lev. 116.
3 Keb. 387.
Pow. 10. 12.
Doug.

Mortgages.

debt.

In the former a tender made not only discharges the lien or debt but the whole obligation. The promise of a gratuity or gift does not in fact create create a legal debt. In the latter a tender at the day fixed of the money does not discharge the debt; it still remains a legal debt, being already created.

The condition in a mortgage deed is always a condition subsequent, altho' formerly it was considered as a condition precedent.

Formerly after the condition was forfeited, the wife of the Mortgagee was entitled to dower in the estate, and it was ~~subsequent~~ subject to all the covenants &c of the husband, & for this reason, it is customary in England to grant very long terms by way of mortgage. And this continues to be the practice in Eng. altho' the reason which gave rise to it has ceased for the wife is not at this day entitled to dower there in such estates.

Mortgages in Con. are almost always in fee simple.

If a bond is given by a Mortgagor, conditioned for for the performance of the covenants &c contained in the mortgage deed — non payment at the day is a forfeiture of the condition of the bond. This was formerly decided contrary as in Cro. James 281. Yelv 206.

Rev. 14. 169. 170.

1 Pet. 5. 7.
445. Rev. 14.
15.

Mortgages.

How Mortgages are Considered in Courts of Equity.

It has been remarked, that at Com. law, if the condition is not strictly performed, the land or property mortgaged, vested absolutely in the Mortgagee or grantee - A very grievous hardship was the consequence of this, for a large and valuable estate would not unfrequently be lost for a trifling sum - Concerning this there was a great controversy between the courts of Law and Chancery - The former contending that upon a breach of the condition the thing mortgaged was gone from the Mortgagor and vested absolutely in the Mortgagee without the possibility of a redemption the latter (Courts of Chancery) contending that the transaction wholly was a mere personal contract and the land or property only a security for the performance of the condition - Also that the Mortgagor was actual owner of the land notwithstanding the non-performance of the condition -

In this contest (as with all others between courts of Law and Chancery) the courts of chancery prevailed, and in consequence thereof, Chancery has cognizance principally of all matters concerning Mortgages - These courts consider that whenever the debt is paid the interest of the Mortgagee determines, and if it is not paid and there is a forfeiture of the condition,

Pow. 2 66. or
256.

9 Mod. 196.
Pow. 15.

Pow. 242. 329.
1 Vern. 182.
2 Pow. R.W.
449.

Pow. Dec. 614.
6 Ib. 599.
3 Atk. 493.
1 Do. 606 —

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the Mortgagee becomes trustee of the legal estate, for the Mortgagor.

As then in courts of equity the whole transaction is considered as a personal contract, and the land a security for the performance of the condition, the debt is the ~~principle~~ principal and the land or estate is the incident & "Accessorium non ducit sed requitur suum principale".

This equitable right which resides in the Mortgagor after a breach of the condition, is called the Equity of Redemption; so we see that it is merely a creature of the courts of Equity.

But altho' the land is considered as the Mortgagor's yet until the redemption, the Mortgagee's interest continues in equity so far as to entitle him to the profits and of course the possession.

From this view of the subject it may be inferred that ~~an to~~ a mortgage is not such an alienation of the property as to except so far as any previous disposition
alter any previous disposition, is necessarily affected by it.

It is an alienation pro tanto i.e. to the amount of the debt for which the property is mortgaged to secure. So also in cases of devises. Mortgages will only effect them pro tanto and will not be considered as a total revocation. It is however a rule in devises that any subsequent disposition of property devised will be at law an entire revocation; but in equity it is clearly settled to be a revocation pro tanto only.

Re. in Ch.
514. Co. J.
49.

2 Atk. 495.

1 Ven. 33.
190. 2. 2 Ver.
384. Pow. 19.
21. 28. 38

2 Ven. 84.
Comy. Re. 609.
2 Ch. ca. 66.
583

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But still if the owner of land devises it to A. and afterwards mortgages it to A - it is a total revocation of the devise even in equity; for it is said that A cannot stand in two characters, i.e. as Mortgagee to himself But Mr. G. does not believe the rule to be founded upon this seemingly technical absurdity; it proceeds upon the presumption of an intention in the party to revoke, and the presumption of such intention cannot be rebutted -

Every contract for the loan of money or payment of a debt secured by the conveyance of real or estate, and not intended to be conveyed in fee &c is a mortgage and so considered.

It is also a rule that all private agreements between the parties made at the time of the mortgage against claiming the equity of redemption are void - For were they suffered they would enable mortgagees to take unreasonable advantage of Mortgagors for Mortgagors are considered very much at the mercy of the the Mortgagee -- The maxim "once a mortgage always a mortgage" applies here; and it is really true that where a condition is added to a mortgage deed, that "if payment be not made at the time limited, the land should be considered as sold" such condition would be void.

As to this point it makes no difference whether the proviso is in a mortgage deed, or in a seperate instru-

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=ment.

The rule proceeds further still for if there is an agreement at the time of making the mortgage deed that the conveyance shall become absolute, provided the Mortgagee advance an additional sum of money it will be void. Such agreements are consider =ed as radically vitious.

But still an agreement that in the case of the sale of the equity of redemption, the right of pre emption shall be ~~reserved~~ reserved to the Mortgagee will be good. Such an one cannot be op= =pressive.

So also a <u>subsequent</u> agreement for an <u>absolute sale</u> executed by the parties, is good. That is, it is ~~not~~ not necessa =rily void, but subject to be avoided where there are any badges of fraud.

So also if the mortgagor makes a subsequent release of his equity of redemption and agrees for a reconveyance — this agreement will be good.

Conditions <u>precedent</u> are construed strictly; but conditions subsequent are construed liberally.

There are also other exceptions to this general rule that "once a mortgage always a mortgage" as in cases of family settlements. Any settlements thus made as <u>charitable</u> or <u>gratuitous</u>, will be good; as where the estate is settled that

Pow. 68. Tab. 46
2 Atk. 71.
3 Woodson
229. P. Ch.
526 — ——

they judgment confirmed

Pow. 68.
Barnard. 90. 3.

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the equity of redemption shall not be claimed except during the life of the Mortgagor.

There being gratuitous acts of the Mortgagor shewing him to be in such a situation as that the Mortgagee cannot take advantage of him and renders them good, and exceptions to the general rule above.

According to rules observed in the ~~Eng~~ Eng. courts of Chancery an <u>absolute deed</u> without any defeasance, may be considered and treated as a mortgage where there are any circumstances which induce a belief that the equity of redemption should be claimed. As where the grantor or mortgagor is suffered to remain in possession - to pay no rents, but pay taxes &c. The superior courts have in two instances acted upon this ground and We G. think upon principles of the highest justice; for the statute of frauds and perjuries is but a <u>rule of evidence</u> and not a <u>rule of property</u>. The courts of error have as often reversed their ~~decisions~~ determinations. This is therefore ~~a~~ left in doubt.

But parol evidence is clearly admissible to prove a payment, and is therefore sufficient to defeat the interest of the Mortgagee.

If ~~therefore~~ also the Mortgagee has voluntarily forgiven the debt parol evidence will be admitted to prove it

Pow. 57.

Pow. 66. 67.
Eno. J. 609. 610.
2 Pl. 184

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But a parol agreement between two co-obligors that the whole shall rest upon one of them will be within the stat. of frauds and perjuries therefore parol evidence cannot be admitted to substantiate. If lands are devised to certain trustees to hold until the rents and profits shall discharge certain ~~debts~~ specified debts, and no power is given them by the instrument of devise expressly to mortgage the lands yet if a sufficient sum cannot be raised within a reasonable time to pay the debts from the rents and profits, the estate may be mortgaged, or even sold for the payment of them, unless it clearly appears from the instrument of devise that the intention of the devisor is otherwise. Pu Ch. 694. 2 Vern or Vern. 310.

Of the interest of the Mortgagor in the Premises Mortgaged.

As soon as the estate is created the Mortgagee may have immediate possession but if there is an agreement that the mortgagor shall remain in possession ~~of~~ for a certain fixed time he is tenant for years to the Mortgagee. But if the Mortgagor is left in possession without any agreement as to the time, he shall remain in possession, so far as it

Doug. 21. 270.
Cro. J. 659.

* The rents and profits are suffered to be taken by the Mortgagor in lieu of interest paid to the Mortgagee —

Doug. 24. 18th.
Cro. Ch. 208.

* Not so with a common tenant —

Doug. 22. 266.
Pow. 67. 68. 79.

Doug. 22.
Pol. 80. Cro.
J. 606.
1 Roo. 477 —

Pow. 75.

Pow. 68. 80.
18th. 606.
Doug. 266.

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respects the right of the Mortgagor he is tenant at will or quasi tenant at will to the Mortgagee; he is not tenant at will in every particular, for, he may be sued in ejectment by the Mortgagee without notice, which is not the case with a common tenant at will.

But on the other hand a Mortgagor their in possession is not liable for rent to the Mortgagee, as other tenants at will are, and the reason is that the rents and profits are to be applied to the payment of the debt and interest.

On the other hand such tenant is not entitled himself after ejectment to the emblements, for all the profits he are to go towards paying the debt. So upon the whole the Mortgagee looses nothing by not being able to claim rent.

Again a common tenant at will cannot lease or underlet the land, but it is otherwise with the Mortgagor in possession, for such lease will not determine his possession but the Mortgagee may if he pleases defeat the lease against the lessee, for the lessee stands in the same situation as the Mortgagor.

Such a lease will be good against the Mortgagor and all strangers, and will entitle the lessee to the equity of redemption.

As the Mortgagee has it at his election to treat the lessee as a wrongdoer or not, it follows that by giving him notice he may treat him as tenant and compel him to pay rent

1 T. R. 460. 7 Dec.
480. 1 Vern.
258. Pow. 470.
2 Bl. 2 Burr.
308.

Eq. Ca. 304.
Pow. 95. 1 Ch. a
59 —

Pow. 105. & 109
2 Vez. 304.
2 Burr. 978.
Pow. 140. Doug.
610. 2 Vern. Ch.
or 61. 2 Atk.
294. 3 P. W.
341. ——

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mere: But he cannot be compelled to payment which he had paid to the Mortgagor, for he would be then paying it twice –

It is now settled that the Mortgagor when sued in eject=ment by the mortgagee cannot set up the title of an other as a de=fence, for he is estopped to do this by his own ~~act~~ deed –

So on the other hand the Mortgagor is estopped to deny the title of his own lessee, while the lease continues, for his title is good against the Mortgagor and against all strangers – From this it follows that this possession will entitle the lessee of the Mortga=gor to sue any stranger in ejectment, for this being a lawful possession, it is alone sufficient for this –

The Mortgagor being deemed in Eq. the true owner of the land and the interest of the Mortgagee a mere chattel in=terest as security for the payment of a debt, it follows that if a freehold is mortgaged the right of redemption ~~remaining~~ remains in the mort=gagor, and his interest will descend to his heirs – or it will pass by devise and whoever possesses this right or interest gains a settlement thereby – The only difference between this interest and a real freehold, is that in this, the title, after forfeiture or breach of the condition cannot be enforced at law – In a devise ~~at~~ it will pass under the ~~det~~ denomination of land as land –

But tho' the Mortgagor is considered as real owner

3 Atk. 423.
Bu. 95

2 Bl. 158

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yet if he commits waste an injunction will issue from Chancery to stay it - even tho' the Mortgage is for a term of years, which cannot be done in case of common tenants for years - Quere -

All the foregoing rules were devised and adopted for the purpose of ~~conveying~~ coming at, what may be called, substantial and moral right -

Of the interest of the Mortgagee.

The interest of the Mortgagee in the premises mortgaged may be considered at four distinct periods - 1st The interest of the Mortgagee from the time of executing the mortgage and before forfeiture of the condition while possession (as is usually the case) in the Mortgagor -

2.th After the mortgage is forfeited by non payment of the money at the day and before the Mortgagee enters into possession.

3.rd After the Mortgagee enters into possession and before foreclosure. and

4.th Of foreclosure, of which Mr. G. will treat hereafter.

1. Of the interest of the Mortgagee between the execution of the deed and the forfeiture of the condition -

Before forfeiture the Mortgagee's estate continues

Pow. 79. 80. 228.
156 – 2 Vern.
156. P. Ch. 423.

Doug. 22.
Pow. 80. Doug.
256 –

2 Vern. 275.
374. Doug. 488
444. Pow. 85.
92. Bro. P. C.
150

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what it was at Com. Law before Chancery interfered. The legal title is in the Mortgagee tho' it is defeasible on performance of the condition. It is the equitable right which results to the Mortgagor after breach of the condition which gives Chancery cognizance of Mortgages. This court then has no sort of concern with them until breach of the condition.

Hence any conveyance or any lease made by the Mortgagor, during this period, is void as against the Mortgagee.

Hence also the ~~Mortgagor~~ Mortgagee may on notice compel the Mortgagor's lessee to pay him the rents, even before forfeiture of the condition.

And this rule holds as well when the lease is prior to the mortgage as when it is subsequent to it. But Mr. C. supposes that rent could not be compelled to be paid by the mortgagee, which had accrued before the mortgage made.

When a term for years is mortgaged by the lessee the Mortgagee is in the nature of assignee of the term, provided the whole of the term is mortgaged; and if the whole is not mortgaged he is liable as derivative lessee but not in the character of assignee.

But such Mortgagee is not liable for covenants which <u>run with the land</u>, unless he takes actual possession of the premises and the reason is that the mortgage is

Pow. 92.

1 Atk. 605.
2 Doug. 610.

Pow. 170.
2 Vern. 621.
1 Do. 3.
2 Vent. 351.

Pow. 95 & 453.
4. 1 P.W. 458.

Pow. 93.
1 Eq. c. ab. 610.

Pow. 93.

regarded only as a security.

This rule holds as well after forfeiture as before. But if the Mortgagee does take possession, he is liable for all the covenants that run with the land, like other assignees, for he takes it cum onere, and enjoying the profits he must submit to the loser.

2d. The two next periods of time, will be considered together; the difference being remarked where any occurs. That is the interest which the Mortgagee has after forfeiture and before possession and after possession and before foreclosure. The interest between these periods is considered by courts of Equity as a chattel interest.

~~Altho'~~ The interest of the Mortgagor will pass under a devise of lands before forfeiture ~~yet between these periods it will not~~.

If then the Mortgagee dies at any time between forfeiture and foreclosure, his interest will go ~~to~~ to his personal representatives; and on the same principle of considering it a chattel interest, it follows that the assignment of the debt does of itself convey this interest.

Hence also the Mortgagee before foreclosure, must not do or exercise any act of ownership which will injure or encumber the Mortgagor's interest.

2 Vern. 592.
592. 3 Salk.
723.

Pow. 95.

3 Salk. 723.

3 Salk. 723.
5 Ba. 4. 2 Vern.
84. 1 Wil. 24.

Pow. 97.
2 Vern. 11.

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In such a case as this, however, the Lord Chancellor observed that a lease would be good, if made to avoid a loss but Mr. G. thinks this dictum of his Lordship vague if not bad.

As the Mortgagee before foreclosure cannot do any act which will injure or incumber the Mortgagor's interest, regularly he therefore he cannot before foreclosure commit waste, for if he does Chancery will issue an injunction to stop it. This rule holds as to Mortgagee in fee.

But if the Mortgagee's security is defective a mortgagee in fee will not be restrained from committing waste even before foreclosure. But in all cases where he does commit such waste he must account for it with the Mortgagor for it; that is, for the value of it, for it must be applied to save the estate, and not to the Mortgagee's benefit.

But tho' the Mortgagee cannot incumber the estate, yet he will be allowed expences for making necessary repairs. These expences are to be added to the principal of the debt against the Mortgagor and it will bear interest.

If a mortgage is made of an estate to which the Mortgagor has no title and afterwards the true owner conveys it to him (the Mortgagor), the Mortgagee shall have the benefit of this, and it is called a graft upon the old stock.

3 Atk. 518.

2 P. W. 146.
P. Ch. 591. 592
Prec. 99. 11. or
111. Contra
Rep. Ch. 108 or
168.

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The Mortgagee is not bound to expend money upon the estate except for necessary repairs; but however if he does expend money in defending the Mortgagor's title he may add it to the principal for it is to be remarked that if the title is attacked it is at the risque of the Mortgagor.

The Mortgagee takes the estate mortgaged, subject to the same incidents to which it is incident in the hands of the Mortgagor. If the Mortgagor therefore has done any act, that amounts to a forfeiture, the Mortgagee will lose his security. Mr Gould apprehends that the following distinction will hold, that when the Mortgagor has done any act which is inconsistent with the nature of the estate, it will be a forfeiture contemplated by the rule; but where the forfeiture in the commission of any offence it is not such an one as will effect the Mortgagee's interest. In the last case the forfeiture does not accrue on account of any injustice done by the remainder man &c and the King can take only what interest the Mortgagor had.

Of the Equity of Redemption & who may claim it.

The equitable interest which results to the mortgagor after breach of the condition, by non payment at the day appointed, is called the Equity of Redemption.

2 Atk. 526.
1 Atk. 606

Winn. 193.
1 Sy. ca. ab.
316. Pow. 108.
1 Ch. ca. 71.

Pow. 168 ca.
108.

Winn. 33. 190.
Doug. 22

2. Ver. 304

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~~The equitable interest~~ This interest is properly speaking a trust. The legal estate until foreclosure is in the hands of the Mortgagee return=able to the Mortgagor.

A Mortgage ~~is~~ really, is after the ~~foreclosure~~ forfeiture completely a trust, a definition of which is, that the legal title is in one for him to hold till a certain purpose is answered, and then to be conveyed to an other.

As the Mortgagor may redeem at any reasonable time by paying the debt and interest, so may any one claiming under him. As where there was a voluntary conveyance, and afterwards a mortgage of the same premises to an other; this altho' it was fraudulent against the Mortgagee, yet it was good as to the equity of redemption and would pass - that, for a volun=tary deed will bind the party that made it, and his heirs.

A second Mortgagee may redeem of a first Mortgag=ee. So a 3rd of a 2nd &c for the rule is that any person having the same interest which the Mortgagor had may redeem.

The assignees of a bankrupt may redeem or assign an equity of redemption.

So also the lessee of the Mortgagor may redeem. So a purchaser or assignee ~~may~~ of a Mortgagor may redeem. So also after the death of the Mortgagor, his heir may redeem. If the interest mortgaged was a freehold and descends

Pow. Ley. Alley.
304.

2 Bur. 978.

Pow. 111. 3 Atk.
200. 1 Vern.
399. 2 Atk.
440. Co. Lit.
102.
2 Bl. r. 402 —
" "

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-ble. The equity descending will be real assets.

An equity of redemption of a mortgage in fee, is governed by the same rules of descent, by which the legal estate is governed.

And as an equity of redemption is devisable, a devisee of the mortgagor may also redeem, for he has the same interest which the mortgagor had.

At Com. law also a judgment creditor of the Mortgagor may redeem, because a judgment obtained is a lien upon all the debtor's estates, but before the bill is brought to redeem, a writ of execution must be sued out, for there is no lien until that is done.

Altho' a judgment creditor in Com. cannot redeem as such, yet if he has actually levied the execution he may redeem, for the levy gives ~~gives~~ him an interest in the Equity.

It has been a matter of much doubt in Com. with respect to the ~~way~~ way in which an equity of redemption shall be levied upon. Two different practices have obtained. The first is if the execution debt is large enough to swallow up the whole of the equity of redemption, the whole is to be levied upon and appraised of to the creditor, and this extinguishes the Mortgagor's interest, but when the debt is not equal to the equity execution may be levied upon a part and that appraised off to the creditor. ~~Secondly~~ the whole

The second method is to appraise off the whole equity of redemption to the creditor, whether the demand is great or small, without entering into any enquiry what the value of that equity is, and in this case the debt from the Mortgagor to the creditor is not extinguish=ed, nor the right of redemption taken from the Mortgagor, but such levy places the creditor precisely in the same situation as if he had been a second Mortgagee, and thereby he gets a security for his debt to the extent of the value of the equity which may be redeemed by the Mortgagor if he chuses, but the levy does not operate as a absolute sale of the equi=ty by the Mortgagor, but as if the Mortgagor had given to the creditor a second mortga-

1 Ono. P. C. 22.

Ono. 110.

P. Ch. 137.

Pow. 112.
1 Vern. 93. 192.
1 Eq. ca. ab. 219.

1 Vern. 191.

Pow. 112.
1 Atk. 602

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may in the first instance be levied upon and then the appriseers will set off such a proportion of the Mortgagor's interest, as is adequate to the debt compared with the whole equity. Here the right of the Mortgagor is not entirely extinguished, the former method of is the one approved by the supreme court of errors.

In Eng. the king may ~~always~~ redeem when the Mortgagor has committed any offence which works a forfeiture.

Tenant by ~~eject~~ Elegit, statute merchant or statute staple may redeem.

If a mortgaged estate or equity of redemption descends to an infant, his guardian may without the direction of a court of equity apply the profits to the discharge of the debt.

After the death of the Mortgagor his widow may redeem, if she has a jointure in the land, and altho' the jointure be received only in part of the estate ~~only~~, yet she may redeem the whole. If she pays more than a third part of the principal money, she shall hold the land until reimbursed. It appears that if the Mortgagee requires it she must redeem the whole.

The husband of a Mortgagor may redeem after the death of the wife as tenant by the courtesy of the equity of redemption.

1 Wy. 298. 307.

Pro. 119.
1 Ch. ca. 107

Pro. 120.

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But in order to entitle the husband to this there must have been a seisen of the wife during coverture i.e. not a corporial seisen but an equitable seisen, and it would seem that the perception of the rents and profits would have been a sufficient seisen —

A subsequent incumbrancer may redeem a former one. If a subsequent mortgagee redeem of a first, the Mortgagor or his heir or his devisee may redeem of him. It is in fact a rule that property in this situation may be redeemed, until it is redeemed by the one who is entitled to the whole interest legal and equitable — For if the defee of the Mortgagor redeem still the Mortgagor may redeem of him — but when the Mortgagor or his heir or assignee redeems he will receive the whole interest — therefore there will be an end of redemption —

A Mortgagor may redeem even after a release of the equity of redemption if it appears by circumstancial proofs that it was made upon a secret trust and for his benefit.

If there be ~~two~~ a ~~tenant~~ tenant for life with ~~interest in~~ remainder man or reversioner in fee of an equity of redemption, they shall contribute proportionably what is due on the Mortgage —

So a devisee of an estate for life in an equity of redemption may redeem and hold over, until those in remainder contribute —

P. Ch. 62.

P. Ch. 44 –

P. Ch. 62.

Pow. 121.
442 –

Vinc. ab. 185.
2 Eq. ca. ab.
5 G. 11. Pow.
Lot 121. 442.

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And if the remainder man or reversioner will neither of them contribute, the tenant for life may hold the land until they pay 2/3 of what is due for principal and interest.

In precedents in Chan. 44 it is advanced that a tenant for life is to pay 2/5. Mr Gould thinks this incorrect, but but believes 1/3 to be the exact proportion.

The general rule is that the estate ~~for~~ of the tenant for life in the premises shall be rated at 1/3 and that of the remainder man or reversioner in fee at 2/3 of what is due for principal and interest.

If the mortgage money is payable on a contingency not arrived, he in remainder or reversion may exhibit a bill in Cha called a <u>quia timet</u> against the tenant for life and compel him to contribute.

That is that he shall pay 1/3 being his interest in the premises or else relinquish the profession. The object appears to be to constrain the tenant for life to keep the interest down if the land be charged; for he cannot be compelled directly to redeem tho' he may indirectly by purchasing in the mortgage.

If the tenant for life of the equity of redemption pay off the whole debt, and takes a conveyance of the estate, makes improvements thereon and dies. Afterwards the remainder man or reversioner comes to redeem they must pay 2/3 of the lasting improvements to his representatives. but no=

1 Vern. 404 –

2 Atk. 294.
2 Vern. 61.
1 Ves. 411. 410.
3 P. Wms 341 –

= thing for the the other third because he received the benefit there = of during his life, and no interest shall be allowed during the life of the tenant for ~~life~~ life for the money he paid, for he is bound to keep the interest down ~~the~~ during his estate—

But as to the proportion of money to be paid between the tenant for life and the remainder man their distinction is to be taken — As has been said if after redemption by the tenant for life, the remainder man applies to redeem during the life of the tenant, the tenant is to pay only 1/3.

But if application is made after the death of the tenant to his representatives they must allow only for the time that the tenant for life enjoyed the estate, and the remainder man would consequently be subject to a greater ~~dis bur~~ disbursement than in the former case —

An equity of redemption on a mortgage in fee is not assets at law, for there the estate of the Mortgagor is gone entirely, the very moment that the equity of redemption commences — Still however such equity of redemption is assets in Eha. and if an heir alienes or releases his equity of redemption to prevent creditors from having satisfaction for ~~debts~~ their debts Eha. will follow the money in the hands of the heir or Exr. —

As however an equity of redemption is only

(a) In the former case the reversion expectant is real — 2 Bl. 511.
and therefore would be assets in the hands of the
heir and not of the Ex^tor —

1 Vern. 410.
2 Salk. 554

1 Vern. 134.
Pow. 136 —

Hardw. 469.
1 Vern. 41.
2 P. Wms. 412.
2 Atk. 50.

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equitable assets and cannot be touched [illegible] thro' the intervention of Ch. the creditors are to be paid pro rata without respect to the degree or quantity of their debts.

In Com. all equities of redemption are real assets i.e. assets at law. An equity ~~may~~ therefore may be attached by com. law process, or by levy of execution, precisely in the same manner as real property is levied upon — An Exr when he makes out an inventory must include the equity of redemption — Even in Eng. the mortgagor's reversion expectant [illegible] a mortgaged term for years will be assets at law, liable to debts, and will attract the redemption —

So also the reversion of a chattel interest expectant on the determination of a mortgage of part of the estate, is assets, but it is assets personal in the hands of the ~~heir and not of the~~ Exr. —(a)

The judgment in these cases will be of Assets "quando acciderint" i.e. when they fall and the creditor cannot lay a bill in Chancery ~~compell~~ & compel the heir to sell the reversion — but must expect until it falls —

An equity of redemption is devisable for the pay.nt for the payment of debts and it is in case of its being descendible that it becomes equitable and not legal assets —

It was once supposed that if a devise was made

1 Vern. 62. 101.

1 Eq. ca. ab.
271. 1 Vern.
63. 101.
1 Chan. 117 —

1 Vern 101.

2 Atk. 292.

1 Salk. 604
Co. L. 14th
1 Co. 124.
Pow. 58 —

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to an Exr. the estate which he had would be legal assets.

But it is now settled that such a devise, either to the Exr. or any third person shall be considered as equitable assets & shall be paid to the creditors "pari passu"

But thó regularly creditors as such have no priority when the fund consists of equitable assets - yet a second mortgagee shall be preferred to any ~~creditor~~ other creditor, for he has priority ~~as~~ not as creditor, but as an incumbrancer having a specific lien on the land.

An equity of redemption has never been held to be liable to a bond creditor during the life of the ~~creditor~~ Mortgagor.

It has been a great dispute in Eng. whether there can be "prospic prætis" of an equity of redemption. The better opinion seems to be in the affirmative.

If a man has a son and a daughter by one wife and afterward has an other son by ~~an~~ a second wife and the elder son dies seised, the estate goes to the daughter in exclusion of the half brother. This is called "prospic prætis"; but if the elder son had never been seised the younger brother would have taken, because all descents are from the person last seised.

Pow. 132.
1 Atk. 604.5.

2 Eq. c. ab. 605
1 Vern. 182.
Pow. 133—

2 Vent. 370.

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A Mortgagor dies in the last case. Quere if the eldest son died in possession, would the daughter take? Sir Joseph Jekyll v. Cheyt was strongly inclined to think she could not but the current of authorities are against him.

For a definition of *possessio Fratris* vide 8 T. R. 213.

In general no person is allowed in Equity to redeem unless he is entitled to the legal estate, according to Powell but Mr Gould conceives this to be absurd, for he that has the legal estate needs no redemption - what Powell means must be this, that no person shall be permitted to redeem unless he has an interest in the equity of redemption - which ought to have been the rule.

But if he in whom the equity of redemption is refuses to redeem any person either directly or consequentially interested, will be permitted to redeem.

Where a mortgagor becomes a bankrupt and a majority of the creditors would not suffer the assignees to redeem, the other creditors were permitted to file a bill for redemption under peril of costs.

If the Mortgagor's heir in whom in whom the Equity of redemption is will not redeem, the creditors may ~~does~~, but if the heir does will redeem the creditors have no right to interfere.

It is a leding maxim of the law of Eng. that an

Comp. 601.

2 Vern. 526.

1 Vern. 282.
1 B. 394 —

2 Eqn. ca. ab.
599 —

Mortgages.

the right of redemption is a creature of Equity, a court of Cha. will al=
ways make it subservient to its own rules.

It is also a leading ~~mak~~ maxim that he who seeks equity must do equity. Hence it follows that a court of Cha. will deem a redemption, either absolutely or conditionally as the justice of the case may require.

The right of redemption is not then ~~absolutely~~ absolute.

If therefore the Mortgagor should apply to redeem on payment of the debt, ~~unless~~ provided he ~~could~~ should not be able to set aside the mortgage at law, the court will not indulge him, for he must relinquish his suit at law, on his application to a court of Cha.

So if having applied previously to a court of law and failed, the Mortgagor ~~applied to equity~~ applies to a court of equity the court of equity will compel the ~~appel~~ applicant to pay the cost and charges of the suit at law.

Again altho' the Mortgagee cannot compel the Mort=gagor to redeem before the day of payment, yet in case of a hard bargain against the Mortgagor, he will be permitted to redeem before that time.

Again if the Mortgagor should obtain possession against the Mortgagee by fraud, pending a suit, or peti=tion for redemption he must restore the premises before he can redeem.

2 Vern. 207 286.

1 Vern. 246.

1 Vern. 245.
1 Eq. ca. ab.
365. 7. Pow.
140 —

1 Vern. 476.
1 Salk. 155.

A mortgagee to B for £1000 who sells to C for £800
A comes to redeem from C he must pay 1000
A mortgagee to B & then to C and B sells for £800 to D
and C comes to redeem from D he pays only £800
So if C a creditor of ~~B~~ A came to redeem he pays £800

2 Vent. 359.
1 Vern. 49. 296.
464. 476.

A mortgagee to B for 1000 of ~~land~~ then to C and
~~B~~ A does buy them & buys out of B for £800 of C
comes to redeem he pays the same £800
same rules as to Creditors and legatees

Salk. 155.
1 Eq. ca. ab. 220

1 Vern. 49. 334
335. 2 Atk. 54.

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In pursuance also of this it is a rule that if A. mortgage Black acre for one debt, and White acre for an other, and one is more than sufficient to secure the debt, and the other secure less than the debt sufficient, he cannot redeem the sufficient one without redeeming the other at the same time.

So if the heir of such Mortgagor wishes to redeem.

So where the heir of such Mortgagor endeavours to defeat the Mortgagee of one of the estates by setting up an entailment & and afterwards applies he shall redeem both or neither.

A purchaser under the Mortgagee shall hold the land against the Mortgagor and his heirs, for the sum due on the mortgage altho' he may have bought it for less money, or given more than it was worth, for he stands in the shoes of the ~~M~~ Mortgagee who assigned, and who might have given it to him gratis.

But as against subsequent incumbrancers or cred=itors the purchaser shall hold for no greater sum than he act=ually paid.

So also if the heir of the Mortgagor purchases the first mortgage at a discount their incumbrance shall not stand a=gainst a subsequent one for more than the sum paid.

So it is a general rule that if an heir at law, trustee, executor, assignee, &c of the Mortgagor purchase in the mortgage at a discount, the creditors and legatees shall have the ~~amount~~

Pow. 143,
1 Vern. 49 —

Pow. 145. Par.
Ch — 511 —

advantage of it - and for want of them the benefit shall go to those en=titled to the surplus -

This rule applies as well to a sale generally as to mortgages

These rules are all founded upon the general ~~principle~~ principle first laid down Ex. p., that the right of redemption is a creature of ~~the law~~ equity - and the courts of Eqa. will always make it subservient to its own rules -

But if the Mortgagee's heir or trustee buy in incum=brances to protect others to which he himself is entitled, the whole money due shall be allowed on account, altho it was purchased for less -

Mr Gould thinks that in this case the general prin=ciple has not been rightly followed - Why might not the doc=trine of tacking securities and be applied here? and why should the heir or trustee be allowed to hold, not having paid an ad=equate or equitable consideration against bona fide ced=itors? What distinction is there ~~between~~ in principle between this and the case of an ordinary purchaser, except so far as it goes to protect his own incumbrance?

If the Mortgagor becomes indebted to the Mortga=gee otherwise than on the Mortgage, the former debts as well as the latter must be ~~pay~~ paid or discharged before the Mortgagor will be permitted to redeem on his own applic

1 Vern. 41. 244.
2 Eq. ca. ab.
6 B. Pro. 143.
5 H—

1 Vern. ~~44~~ 245.
1 P. Wms. 775.
1 Ves. 87—

2 Vern. 174.
P. Ch. 512.
3 Salk. 240.

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cation — for the condition being broken the estate of the Mortgagee becomes absolute at law, and he must do equity before he can have equity.

But if the Mortgagee in the case supposed exhibits his bill to foreclose, the Mortgagor is not bound before redemption to pay the other debts.

It is a general principle in Cha. that a change of the relation between ~~the relations of~~ the parties, as to being Pltf. or Deft. is a change in equity. For instance.

~~Surely~~ if the Mortgagor's heir would redeem ~~he must~~ he must pay every debt due to the Mortgagee by bond, as well as by Mortgage if he would make the application himself, but the debt must be by bond, or of as high a nature as a bond debt, otherwise the heir is not liable — for simple contracts will not bind real estate, in the hands of the heir — ubi eadem ratio ibi idem jus — how different if the Mortgagor redeems.

In coincidence with the same rule, if a lease for years is mortgaged, and then a new debt contracted by the Mortgagor on bond, the Exr. ~~may~~ must pay both; indeed Mr. G. supposes that he ~~may~~ must pay other than bond debts, for a lease being personal is certainly liable for debts on simple contract.

But if there be several encumbrances upon an

2 Atk. 52.
3 Salk. 240.
84. 3 Atk. 556
1 Vez. 84—

Pow. 145.
P. Ch. 511.

Pow. 145. 6.

2 Rep. Ch. 269.

Pow. 146.
2 Eq. Ca. ab.
64 611. 3 Atk.
518.

Mortgages.

estate, and the first incumbrancer has a bond debt, it will be post-poned to all real incumbrancers on the land whether by mortgage judgment, or stat., for the bond is no specific lien on the land ~~charge on the estate~~, and the first incumbrancer has not the same equity against a puisne in-cumbrancer, as against an heir at law who is liable to the bond in respect of assets.

Since the stat. of fraudulent devises the devisee of the equity of redemption cannot redeem without payment of the debt in bond and upon mortgage; because the statute makes such devise void as against creditors, and then the devisee stands in the same place as the heir would have stood if no devise had been made.

Before the statute however such a ~~creditor~~ devise would not have been liable to a bond creditor.

Further if the assignee of the Mortgagee has a bond debt, he has the same equity against the Mortgagor and his representatives as the mortgagee himself had, and no other.

If the money due the Mortgagee on bond was prior to the mortgage, the rule is the same, as when it is ~~a~~ ~~estate~~ subsequent to it.

When the Mortgagor is Pltff. in a bill in equity to redeem, the court ~~with extend~~ will extend the debt beyond the penalty of the bond, if the principle and interest exceed

Pow 146. 7.

Pre. Ch. 191.

1 Vern. 41.

Pre. Ch. 99.
5 11. 2 Stra.
110 7. 1 Ves.
8 7. 2 Do. 862.

it.

The rule is the same when the Mortgagor's representatives petition for a redemption - The courts do not attempt to alter the contract, but they impose terms on him who applies i.e. the Mortgagor -

But this can never be done in an application of the Mortgagee to foreclose, for it would alter the contract -

There are many cases in which the Mortgagor and his representatives on a petition to redeem are bound to pay the debts not due on the Mortgage as well as those that are -

Where the Mortgagee has practiced fraud upon a third person by the concealment of a debt due on bond the Mortgagee shall be permitted to redeem on payment of the ~~bond debt only~~ principle money only.

And if part of an original mortgage be paid off and then a further sum be borrowed on a defective title, the last sum must be paid as well as the first on redemption by the Mortgagor -

But the purchaser of an equity of redemption for a valuable consideration may redeem without paying the debt not secured by the Mortgage for he is not the debtor - the purchaser the land incumbered and the land

3 Atk. 313.
1 Eq. ca. ab.
314. 3 P. W.
284.

Mortgages.

in the hands of the alienee can not be charged to a greater amount than the incumbrance itself - for he has no order of it

Indeed the Mortgagee's claim to have his bond debts paid, as well as those secured by mortgage, is good ~~only~~ alone against the Mortgagor and his assets -

Length of possession by the Mortgagee after forfeiture is not of itself absolutely a bar to the Mortgagor's right of redemption, ~~yet courts of equity have so far followed the statute of limitations~~ for mortgages are not within the stat. of limitations -

But altho' length of possession after forfeiture is not considered a bar to the Mortgagor's right of redemption, yet courts of equity have so far followed the stat. of limitations in Eng. as to say that twenty years possession after forfeiture is *prima facie* evidence of the Mortgagor's having abandoned his right of redemption - And indeed it is generally conclusive evidence unless there are some incapacities or disabilities on the part of the Mortgagor, which hindered him from redeeming.

This equitable bar to the Mortgagor's right proceeds principally upon the presumption that the Mortgagor has abandoned his right; if this presumption can be removed or rebutted the Mortgagor's right will not be

~~1 Ch~~ Ch. Eq. ca.
ab. 595.
5 Vern. 505.

2 Atk. 399.
2 Vern. 413.
Pow. 144.

Pow. 150. 161.
3 P. Wms. 287.

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bared.

This presumption is rebutted or rather may be rebutted by proof of such circumstances as account for the Mortga=go's not redeeming consistently with his not having aban=doned his right — such as imprisonment, having been beyond sea — &c —

This presumption may also be rebutted by facts shewing that the relation of the Mortgagor and Mortgagee has been recognized within 20 years in Eng. and 15 Lou. — Indeed any act of the Mortgagee by which he has recogni=zed the Mortgagor's right of redemption within 20 years will prevent a bar of the redemption —

If the Mortgagee ~~wi~~ has within 20 years exhi=bited a bill to foreclose it will preserve the equity, for it is a recognition of the Mortgagor's right within the time limited —

If the Mortgagee has received part payment ~~wi~~ within the time limited, the Mortgagor's right is not bar=red —

The time allowed for redemption after the re=moval of any of these disabilities, is the same as that prescribed, in the stat. of limitations in <u>real estates</u> — Ten years in Eng. and five in this state —

Pow. 151.

(a)

As for instance A. gets into possession of B's land and remains in 5 years and then B. without taking any notice of it goes off to sea and is gone so long that the 20 years in Eng. & 15 in Lon is passed over his going to sea will not stop the statute of limitations from running upon the land. this rule is not much adhered to in Lon. as in many cases it might work great injustice —

2 Vern. 418.
1 Eq. ca. ab.
315. 3 Atk.
333

1 Vern. 418.
Pow. 156.

Pre. Ch. 423
1 P. W. 291.
2 Vern. 401.
2 Atk. 368.

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But if any fraud has been practiced upon the Mortgagor to prevent his redeeming, no length of time whatever will bar his right of redemption, for it is a maxim of Equity as well as of law, that no length of time will be construed so as to suffer a man to take advan=tage of a fraud —

As to these disabilities the rule is the same in equity as at law — for if the statute of limitations has begun to run, the intervention of any of the legal disabilities does not prevent it. i.e. does not prevent a bar against the person before having a right to redeem — (a)

These disabilities to have any operation or effect must exist at the time when the right accrues — i.e. when the equity of redemp=tion commences, which is at the forfeiture by the breach of the con=dition —

When it is agreed between the parties, that the Mortga=gee may take possession of the premises and hold until he is sat=isfied, from the issues and profits of the land, no length of time shall bar the Mortgagor's right of redemption — even tho' it appears by the Pltfs own shewing that 60 years had elapsed —

In case of a mortgage in Wales or a Welsh* mortgage, the possession of the Mortgagee for any length of time is no bar.

A Welsh mortgage is one by which money is ~~deemed to be paid~~ secured to be paid on a given day in a certain

(a) By an Eng. stat. 4 & 5 Wm. & Mary the Mortgagor is deprived of his equity of redemption, if he is guilty of fraud on the Mortgagee, by concealing any prior incumbrance. 2 Vern. 549, 1 Eq. ca. ab. 320. Fow. 156.

2 Atk. 180.
Fow. 160.

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or the same day in any subsequent year – There then is no need of the interference of a court of Chan. for it may always be redeemed at law, for there is an everlasting subsisting right of redemption descendable to the heir of the Mortgagor which cannot be forfeited at law like other Mortgages – Therefore there can be no equity of redemption –

Again, the length of the Mortgagee's possession can in no case be a bar to a decree of redemption if the Mortgagee will submit to a redemption, but if the Mortgagee does not avail himself of this right he will be deemed to have waved it –

Further if the Mortgagor remains in possession no lapse of time will bar a redemption, ~~if he is guilty of fraud on the Mortgagee, by concealing any prior incumbrances~~ – (a)

We have no such statute in Con. But Mr G. supposes that our courts of equity would adopt a similar rule – that is if we can suppose a case in which a second Mortgagee can be injured – Our records are considered as <u>constructive notice</u> of the situation of the lands, therefore the rule cannot well apply –

If any person who shall once mortgage lands for a valuable consideration, shall again mortgage the same lands, or any part thereof to any person, the former mortgagee being in power, and shall not discover the same in writing to the second

1 Cha. Rep.
33.

Cro. Car. 447.
449. 450. —

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Mortgagee such Mortgagor shall have no relief or equity of redemption against the second Mortgagee, but such second or third Mortgagee, may redeem any former one.

It is incumbent on the Mortgagor under the statute 4 & 5. Wm & Mary, previous to a second mortgage of his lands, to give the Mortgagee notice in writing under his hand of all prior incumbrances.

A second mortgage of the same subject is a mortgage of the land itself and not of the equity of redemption for this is all that preserves the right of the Mortgagor after a second mortgage; for were it not so he could not redeem the first untill he redeemed the second. this may appear to be a mere nominal distinction but it is highly important.

Of a Devise of lands mortgaged by the Mortgr.

The interest of a Mortgagee like that of the Mortgagor is devisable and the devisee as he stands in the place of the Mortgagee may have foreclosure.

It was formerly the case that the whole of the Mortgagee's interest in a mortgage in fee would not pass in a devise under the general words "all my mortgages" but the devisee would have had an estate for life only, and the rec-

2 Bur. 978.

2 Vern. 641.
1 Ro. B.
2 Vent. ~~97~~ 351.

Barnadis.
457. 2 Eqca.
ab. 606.

1 Equ. ca. ab.
318.

Barnadis.
259. 2 Atk.
113.

=son is that his interest may not be deemed a chattel interest.

But now the Mortgagee's interest being deemed a chattel interest only, the whole will certainly pass under the general words "all my mortgages" &c

On the other hand the interest of the Mortgagee will not regularly pass under the words "lands tenements hereditaments" in a devise, for these words are used to denote real property therefore they will not regularly carry the interest of the Mortgagee.

But tho' this is the general rule it is not universally true, for if the Mortgagee had no other property at the time of making the devise which would answer the description of the words, such property as did answer the description will pass under these general words

When therefore the Mortgagee that is the devisee has no ~~property~~ other property answering the description, the mortgaged premises will pass.

A foreclosure obtained by the devisee of the mortgagee is not had against the Mortgagee but against the Mortgagor and his heirs. The heir of the devisor is no party because he has no interest in the lands.

It is laid down that a devise by the mortgagee of money due on a mortgage, does not carry the interest due on the debt at the time of the Mortgagee's death, but the principal only. Mr Gould however thinks this rule too broad for he has no doubt but

3 Mod. 260.
Carth. 79. 81.
35. 2 Burr.
978.

Pow. 181.

1 Bro. Par. ca.
66. 2 Burr.
524. 1 Eq. ca.
ab. 142.
2 Ver. 477.
Pow. 181. 2. 3.

1 Ver. 360.
1 P. W. 280.
1 T. Ro. 755.
1 Vern. 187.

that the interest may pass in certain cases.

The question has incidentally arisen whether the Mortgagee's interest will pass under a devise - not attested under the stat. of frauds and Perjuries. It seems that it will, for this statute refers to real estate the interest of the Mortgagee is a mere chattel interest and therefore not embraced by the statute.

Of the priority of Incumbrances, and of tacking of prior and subsequent Incumbrances or securities.

The general rule is if there are several mortgages or other incumbrances upon the same estate, priority takes place among the incumbrances according to the dates of the respective securities. The first incumbrancer who has the legal estate shall be preferred to the second and so on.

Incumbrances in Eng. stand upon the same footing in order of time, as statutes, judgments, and recognizances.

In Con. neither statutes, judgments, nor recognizances encumber, for we have no statute which interferes, but the latin maxim governs "prior in tempore potior est in jure"

But this priority under some circumstances is forfeited or rather lost i.e. when prior incumbrancers are postpon-

1 Vern. 370.
Barnard.
101. 2 Atk. 49.

1 P. Wm 393.

1 Ver. 6. 1 Bro.
Ch. 957 —

1 Ver 360.
1 Vern. 136.
3 P. W. 280.
1 T. R. 755.
463. 2 Vent.
337.

Mortgages.

=ed to subsequent ones - 2 Vez. 570. 1 Stra. 240.

This loss of priority may happen 1st when the prior incum=berancer has been guilty of any fraud or neglect affecting a subse=quent incumbrancer.

1st As to the first class of cases. If the first Mortgagee by fraud or artifice conceals his mortgage to induce another person to lend money upon the security of the same land, and this person does actually lend his money the first Mortgagee shall be postponed to the subsequent incumberancer.

2d So also if a first Mortgagee be a witness to a mortgage lead made to a subsequent mortgagee of the same premises and shall not inform the second Mortgagee he shall be postponed to the latter and it is to be remarked that the law always pre=sumes that the witness knows the contents of the instru=ment which he has attested - And this throws the onus proba=di of not knowing the contents upon the first Mortgagee.

In all these cases the first Mortgagee is deemed to be guilty of fraud -

But further it has been said that if the first mortgagee has been guilty of any neglect whereby another person is induced to advance money upon the security of the same land the first Mortgagee shall lose his priority because he permits the mortgagor to retain in his hands the evidence of a complete title; for the

2 Verm. 554.
or 564.

Mortgagee should have taken the title into his possession ~~into his~~ and thereby have avoided this danger. The maxim of equity which applies here is that where one of two innocent purchasers have been guilty of neglect, and one of them must be a sufferer, the loss shall light on him ~~on~~ ~~and~~ from whose omission the mischief arises.

Again if one who is about to lend money upon a mortgage, requests to know if he has a mortgage of it, and he denies that he has any, he loses his priority, ~~if~~ provided he informs the first mortgagee on application that he is actually about to lend money on the same security to the Mortgagor. If he does not so inform him, the first mortgagee will not lose his priority by such denial; for the first Mortgagee is not bound to answer unless he knows the intention of the applicant.

Again a prior incumbrancer may lose his incumbrance by the second incumbrancer's purchasing in the prior incumbrance ~~to~~ to protect his own.

Where a subsequent incumbrancer obtains the <u>legal estate</u> he may make all the advantage of it, which the law will admit of and thereby protect his title. Where the equitable interests are equal, and it is a rule that where two equities are equal, that which has the law on its side shall prevail.

But in order to entitle the subsequent incum-

(a) without knowledge of any intermediate incum-
-brancer, for then he will have law and equity
on his side —

(b) But where a subsequent incumbrancer gave
credit to the Mortgagor knowing of the precedent
incumbrancer he will not be admitted to take
on his equity i.e. he shall gain no priority —
2 Ver. 574. 2 Vent. 339. 1 Vern. 178. 3 Vent. 334. P. Ch. 266.
Vern. 187. 8. —

2 Vern. 279.

1 Vern. 49.
P. C. —

2 Ver. 486.
2 Vern. 608.

Mortgages.

=brancer to a priority he must have given his credit to the Mort=gagor (a) ~~knowing of the precedent incumbrancer, he will not be admitted to tack on his equity i.e. he shall gain no pri=ority~~ (b)

To exclude the subsequent Mortgagee from the privilege of tacking he must have had notice of the intervening incumbrancer at the time of lending his money or giving credit to the Mortgagor; for such knowledge after the money lent will not exclude the tacking or priority.

This privilege of tacking is called by Ld. Hale "tabula in naufragio"

A subsequent incumbrancer may tack in this way his equity not only to the first mortgage but to any other incumbrancer or mortgage that carries the legal estate—

In all of the above cases the subsequent incum=brancer gains a priority over all the intermediate incum=brancers until his own debt together with the interest on both are satisfied—

To the general rule that equitable interests have priority according to the dates of their respective securities, there are certain exceptions— As where any one of the parties has more equity to claim the legal estate than the others, for he that hath more equity shall be preferred It being a maxim

(a)

It will ~~become~~ be understood that B. in this case will have a right to redeem for the 40 acres of the 60 if he pleases ~~but if~~ without redeeming the 20. but if he wishes to redeem the 20 he cannot do it without redeeming the 40 also.

2 Vent. 339.

1 P. W. 495.
1 T. Ro. 479.
1 Equ. ca. ab.
3 2 B. Pow.
212

Mortgages.

in equity "that what ought to be done have been done is al=
=ways to be considered as done"

But if the prior incumbrance which carries the title attaches on a part only of the subsequent mortgage, it will protect that part only and no more — And therefore if a mare being seized of 60 acres of land mortgage 20 to A. & then the whole to B. and afterwards the whole to C. — Then if C. purchases in the first incumbrance that shall not protect more than 20 acres but it shall so protect those 20 acres that B. shall never recover them untill he pays all the money due on the first and last mortgage — (a)

But if the prior incumbrance bought in at=
=tach upon other estates, as well as that effected by the subsequent mortgage the subsequent mortgagee shall hold all the estates comprized in the incumbrance bought in until he is satisfied as well for his own debt, as for the money paid by him in purchasing in the first mortgage —

If there are three mortgages or more of the same property, the first of which covers ~~the two others~~ more than ~~two other~~ the two others, the subsequent ~~purchaser~~ incum=
=brancer may by purchasing in the first which covers the two others, hold the whole until both debts are paid —

A satiffied incumbrance or mortgage is one

1 Vern. 187—

2 Vern. 80.
Hardress.
31 G. 172—
Pow. 214

1 Eqca. ab. 322.
2 Vern. 279.
1 Cha. ca. 35.

2 Vez. 149.
1 Do. 52. 53.
Pow. 215—

Mortgages.

paid after the day of payment has expired. This payment it seems does not ~~it seems~~ revest the legal title, but the Mortgagor has his remedy in Cha. only.

In all cases a subsequent incumbencer may take by purchasing in the prior incumbrances. It is presumed however by Eds that there may be cases so circumstanced as to prevent this taking or gaining priority.

A prior incumbencer may always make use of his satisfied incumbrance at law, except when there is a good legal defence to it. This rule however appears to go a great length. It is difficult to discover the equity in it, for the right purchased in, is merely nominal and excluded by the supposition in this case, an actual, ~~and~~ legal, and equitable interest.

The rule goes farther; it seems to be settled, that the subsequent incumbrancer by purchasing in their nominal satisfied estate, without paying a valuable consideration, holds against intervening incumbrancers. This is certainly extremely inequitable.

And in pursuance of the last rule, courts of Cha. have gone so far as to say that the naked possession of such incumbrancer, shall gain him priority, and protect his estate against all intermediate incumbrancers, Sed quere.

Pow. 215.
2 Ves. 204.
1 P. W. 240.
2 Eq. ab. 592.
7 Viner 54.

1 P. W. 495.
1 T. R. 772.

2 P. W. 491.
2 Ves. 562.
R. Ch. 494.
310. 1 Equa.
ab. 3 Ch.
2 Atk. 347.

2 Vern. or
Eq. 156.

Mortgages.

But where the prior incumbrance ~~incumbrance~~ thus purchased in, is deficient in any of its legal requisite, it will give no priority to such prior subsequent incumbrancer.

As if a recognizance bought in, hath not been enrolled in proper time, or in case of a judgment, if it has not been docketed ~~of~~ be.

Indeed the subsequent incumbrancer can gain no priority except by purchasing in the legal estate, for there is no such thing as tacking an equity to any incumbrance, but that which carries the legal estate long with it.

No other incumbrancer than the Mortgagee is allowed to tack. A judgment or statute creditor in Eng cannot obtain a priority by purchasing in the legal estate, so as to tack his own equity — for he has only a general, and no specific lien upon the land — He is not deemed therefore to have equal equity with an intermediate mortgage incumbrancer.

The law of tacking is founded upon the general maxim that where equities are equal, that which is on the side of law shall prevail.

The purchase of the first mortgage will give no priority to the purchasing subsequent incumbrancer, unless the first mortgage be forfeited at the time of purchasing — for before that time, the estate is defeasable at

Pow. 229.
2 P. W. 494.
2 Atk. 352.
2 Ver. 663.
1 Ch. ca. 119.

Pow. 230.
2 P. W. 494.
P. Ch. 226.
2 Eq. ca. 574.
2 Atk. 352.
2 Ver. 662.
224 ——

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Com. Law by paying the money or ~~forfeiting the condition~~ fulfilling the condition, and is not a subject of equitable jurisdiction, for the court of equity has nothing to do with mortgages until the condition is forfeited.

A prior incumbrancer having a legal estate may tack a subsequent sum advanced by him on a former security to his prior mortgage, and thereby protect him against mesne incumbrances, so far as to this subsequent sum he stands in the place of a subsequent Mortgagee who has purchased in the prior mortgage i.e. the legal estate. In order Mr Gould supposes to give him this privilege of tacking, he must have had no notice of any mesne incumbrances, at the time of advancing this subsequent sum. This, Mr Gould conceives to be the equitable qualification, altho' no such is laid down in the books.

So also, if there are two or more Mortgages and the first make a subsequent loan to the Mortgagor, after the subsequent mortgage, and takes a judgment for security, he may tack this judgment to his original mortgage, to protect himself against the intermediate incumbrances. He hath here the legal estate, and the judgment, which latter tho' it passes no interest in the land, operates as a lien thereon.

This rule with respect to notice has an except=

3 Bac. 644.
1 Eq. ca. 320.
Pow. 215.
232 —

Pow. 234.
1 P.W. 491.
2 Vern. 564.
Salk. 449.
3 Bac. 648.

7 Vin. 62.
Pow. 2[illegible].
285 ——

=ion; for it is a rule, that where the intervening incumbrance is defective the subsequent incumbrancer may tack, and hold to the exclusion of the mesne incumbrancers, altho' he knew at the time of lending the money of the intermediate incum=brancers.

So also if the mortgage is defective in legal requi=site, the last shall be good against the first incumbra=cer, altho' the subsequent mortgagee knew at the time of giving credit to the Mortgagor of this first incumbrance: The reason is plain; the first mortgage being defective in form, does not carry the legal estate.

But a defective Mortgage will be enforced in a court of Equity against creditors, who have only a general and not a specific lien upon the land; for as they did not originally take the lands for their security they will be postponed until such defective security shall be satisfied.

If the mortgage deed contains the clause ma=king the land a security for subsequent loans, such loans will have relation to, and be taken as a part of the original mortgage.

This rule holds, if the first mortgagee had notice of the intervening incumbrancer at the time

Pr. Ch. 226.
2 Vent. 361.
2 Vez. 450.
8 P. W. 248.
2 Ch. ca. 73.
Pow. 253.

1 Vez. 56.
95. Pr. Ch.
19. Pow.
254 —

2 Vez. 450.
Pow. 254.

1 Vez. 97.
2 Atk. 19.
141. Pow.
255. Cha.
52. —

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of making subsequent loans — that is if the second Mortgagee at the time of giving credit, knew of this restrictive clause —, for if he did not, and the first Mortgagee had notice of this ~~clause~~ encumbrance at the time giving credit, i.e. the time of making the second loan, it will not hold against the subsequent Mortgagee —

Where notice under the preceding rules varies the rule of priority, if notice is charged by one party, it must be substantially and positively denied by the other, or he will be deemed to confess that he had notice —

If notice is denied by the subsequent incumbencer, who has purchased in the legal estate, and the fact is attempted to be proved by the testimony of one witness only, the bill will be dismissed — for this is oath against oath and is not sufficient proof according to the rules of evidence in Chancery —

It is a rule of the court of Chancery, when the Pltff charges not only notice in general, but also special facts & circumstances, that they must be denied as well as notice in general —

But if there are circumstances corroborating the testimony of the witnesses advanced, when the Deft. denies, an issue will be directed in a court of law, whether the Deft. had notice or not, but if the circumstances are satisfactory to the Chancellor, he will dispense with such issue

Pow. 256.
Goulds note
147 —

Pow. 156.

Pow. 257.
264.

1 Vin 219.
2 Vern. 662.
2 Eq. ca. ab.
Gib. Resp. Eq.
8. ——

1 Ver. 215 —

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and find the fact himself.

Of Notice express and Implied.

Notice is of two kinds actual or express and constructive or implied.

I. Actual Notice. One is said to have actual notice, when he is party to a deed, and which shows the fact, or has notice regularly served upon himself.

But a flying report, is not considered as actual notice Ex gra. A. being about to lend money to a stranger, to the contract, on mortgage, some one says to him "B. has a mortgage of the same land" This Caveat is not deemed actual notice.

II. Presumtive notice, is a conclusion of law that one has notice of the fact, tho' there is no proof of actual notice; as where one cannot make out a title but by a deed &c which discloses a material fact, by which the person to whom notice should be given is necessarily, or may be necessarily lead to a knowledge of the fact. As where A. conveys to B. reserving a power of revocation. B. conveys to C. C. is here deemed to have notice of the power of A. to revoke.

So if P.S. devises lands to A subject to legacies and A. mortgages the land to B. B. is presumed to have notice

Pow. 2. 66.
2 Ves. 384.
2 Ves. 486
Pow. 271.

Pow. 264. 265.
1 Ves. 173.
3 Atk. 236
2 Pow. 148.
150. 2 Ves
444

2 Atk. 54.
1 Ves. 387.
1 Atk. 490.
522.

that the land is charged with legacies, otherwise he is guilty of gross neglect, for Ds. devises the title ~~the title~~ under the devise —

So if a deed creating a prior charge upon an estate, is delivered among other papers to a purchaser, he is presumed to have notice of the prior charge, &c. where a mortgage is made by indenture, the mortgagor's duplicate is delivered to a subsequent Mortgagee, before he lends his money, this is deemed sufficient notice —

The general rule preceding admits of one exception. In case of an assignment of a testator's property, by an executor, the Assignee is not deemed to have notice of the contents of the will in favor of creditors and legatees — Otherwise than this ~~This~~ would be dangerous, besides the purchaser cannot know the amount of Debts &c and the assets —

A recital of one deed stating, or necessarily implying that there is an incumbrance on the land, by a prior deed, is deemed sufficient notice to a person possessing ~~notice~~ the deed —

It is laid down as a rule that whatever is sufficient to put the party charged with notice upon an enquiry is in equity deemed sufficient notice —

Upon the same principle it would seem that notorious possession by a prior Mortgagee would be a suffi=

1 Vez. 61.69.
2 Vez. 477.
485. 2 Verm.
574 —

1 Vez. 55 —

2 Verm. 609.
1 Bno. pow:
Ch. 244 —
Pow. 82-75.

Pow. 283.4.

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=cient notice of the incumbrance to a subsequent Mortgagee.

Notice to one's attorney, agent, or counsel when acting for the ~~principle~~ principal is constructive notice to the principal himself.

This rule holds also when one is agent for both parties, as is frequently the case in marriage settlements.

Further if one person takes upon himself to act for an other, without authority, and makes a mortgage or purchase and the principal afterwards ratifies the act, or ~~argues~~ agrees to it, he makes the former his agent "ab initio"

But notice of an act of bankruptcy will not be presumed against a subsequent Mortgagee, to prevent him from availing himself of the right of tacking.

So also a subsequent Mortgagee may tack his equity to the legal estate notwithstanding an ~~intervening judgment~~ intermediate judgment obtained against the Mortgagor in a court of law ~~other it~~ who it is matter of record - for judgments obtained by intermediate incumbrances are deemed to be unknown as to third persons, and cannot effect third persons unless they are proved to have had express notice thereof before they lent their money.

A question has arisen in Con. whether a subsequent Mortgagee can tack his equity to the legal estate

Pow. 287.
1 Eq. ca. ab.
615. 2 Ao.
609.

Cowp. 712.
1 Ves. 64.
2 Atk. 275.
3 Ao. 646.
Stra. 664.

1 Ves. 64.
3 Atk. 646.
2 Atk. 275.
2 Bro. p. ca.
425.

1 Eq. ca. ab.
384. or 334
Cowp. 280.
711 ———

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by purchasing in the first Mortgage or legal estate, over the intermediate incumbrancers whose deeds are recorded? On principle such records ought to be esteemed as notice, for certainly their object is to give notice to third persons merely and not to the immediate parties. But in Eng the fact of registering intermediate incumbrancers, has not been considered constructive notice.

But a subsequent Mortgagee having notice ~~of a prior~~ of a prior Mortgage not registered, cannot gain a priority by registering his own deed, and purchasing in the legal estate. The courts in assigning their reasons for the rule, consider the subsequent Mortgagee as having that notice which the statute was intended to require.

A subsequent Mortgage ~~registering~~ registered is preferred to a prior one, not registered, if the subsequent Mortgagee had not actual notice. This is indubitably agreeable to principle; for the stat. regularly gives priority to incumbrancers according to the dates of their respective deeds.

But a purchaser for a valuable consideration shall hold against a prior voluntary conveyance tho' he had notice of the voluntary conveyance at the time of ~~last~~ taking his deed; for a conveyance fraudulently made to cheat creditors and bona fide purchasers is ipso facto void, and the making a voluntary conveyance always raises a pre-

1 Ath. 571.
Pa. Ch. 51.
Talb. ca. 187.

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=sumption of fraud. This rule holds as well to incumbrancers as to common purchasers.

It is a rule if one purchaser of a prior incumbrancer with notice, and then sells to another who has no notice the notice given to the grantor or vendor shall not effect the grantee.

If A. mortgages an estate to A. and then mortgages the same to B. who has notice, and then B. sells it to C. without notice, C. who had no notice at the time of purchasing is not effected by the notice which B had.

If a person purchases for a valuable consideration, with notice of a prior incumbrancer who had no notice, the last purchaser is not effected thereby, for in so doing, he in no manner injures the prior incumbrancer, subjecting him to no more inconvenience than what he would have experienced under the grantor himself, he (the last purchaser) standing in the place of the grantor.

This principle has been extended one step farther: If A. purchases with notice of a prior incumbrancer, and afterwards sells to B. who has no notice, and B. sells to C. who has notice, the last purchaser is in no degree effected thereby.

1 Eq. ca. ab.
3 & 6. 1 Viner
170 —

2 Vent. 348.
Hardr. 467.
1 Ch. ca. 289.

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The relation in which A stands to B falls under the first rule, and that of B. to C. under the second.

To whom the interest of the Mortgagee on a forfeited mortgage shall belong after his death.

Formerly it was much doubted whether the money due on the mortgage should on the death of the Mortgagee go to his real or personal representatives.

This distinction was taken, that if a bond was given conditioned to be paid to the Mortgagee or his Exr. it went to his Exr. But if there were no bond, or one was given conditioned payable to the Mortgagee, his heirs, Exrs., or assigns, payment was to be made to his heirs.

But more recently the court of Chancery has considered the interest of the Mortgagee as merely personal and consequently the money in all instances goes to the Exr.; unless the Mortgagee himself has manifested a contrary intention.

Such contrary intention may be manifested in a variety of ways. Any act however which indicates an intention to convert this chattel interest into a realty will cause this interest to be considered and treated

Pow. 299.
301.

Pow. 299.

Barnad. 51

Pow. 302.
2 Vent. 348.
351.

1 Eq. ca. ab.
319.

2 Ch. ca. 187.
1 Vern. 412.

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as real. As if the he purchases the equity of redemption, or obtain a foreclosure and take possession he.

Another reason for their money going to the personal representatives is, that the loan or debt for the security of which the mortgage was taken came from the personal estate of the Mortgagee, and the payment of the debt ought therefore to accrue to the same fund.

If the money is made payable to the Mortgagee, his heir, or Exr, the Mortgagor may on the day of payment pay to either of them at his election, for here he prevents the jurisdiction of Equity, by fulfilling his condition at law.

If he pay it to the Exr the heir must recover the land, for he is a mere trustee, and the trust is satisfied. But in Equity as between the Heir and Exr the money belongs to the latter, and the heir if it is paid to him, is compellable in Chancery to pay it over to the Exr.

If there are two or more Exrs payment may be made to either, and a discharge from the Exr to whom it is paid is a full and complete discharge.

A bequest of a specific specific legacy to the Exr does not bar his right to the money, for he holds merely as trustee in autre droit.

1 Eq. ca. ab.
328. 1 Vern.
4 170.

2 Vern. 193.
1 Vern. 4.
170—

2 Vern. 193.
1 Vern. 4:
170.

1 Vern. 271.

Burn. 969.
2 Vern.
581. Br
Ch. Ch. 265.

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When there is no Exr. appointed the money belongs to the Adr., and the heir must convey to such Adr. when there are no debts due from the estate, for the claimants under the stat. of distributions have more right to it than the heir.

So when the Mortgagor releases his equity of redemption to the heir of the Mortgagee, the personal representatives of the Mortgagee have still a right to the Mortgagee's interest, but not to the whole estate as Powell incorrectly ~~states it~~ expresses it.

So also tho' the Mortgagor was foreclosed, the personal ~~representatives~~ representatives will have the Mortgagee's estate, if the Mortgagee had not taken possession of the premises.

But whenever the owner of the Mortgage himself considers it as <u>real property</u>, it will be so considered after his death, and the money if the estate is redeemed will go to the heir. As when the owner of the estate purchased it under an absolute deed.

So also if the Mortgagee devises his mortgage as real estate, the heir of the devisee and not his Exr. will be entitled to it after his death.

But the Mortgagee's intention of considering it as real estate, does not operate upon the Mortgagor

3 P. W. 244.

2 Ves. 258.
3 P. Wm. 254
or 5 B. & Ald.
467. 2 Ph. 55.
3 Ph. 783.
1 Ves. 15 –

1 Vern. 294.
Finch. Ch.
~~1 Ch. Ch.~~ 244.

or any claimant under him, but merely upon the Mortgagee's representatives.

Again; if money received by mortgage is directed to be laid out in lands and settled in any certain manner, it is bound by the direction, and goes as land would have gone if purchased with the money; for equity considers that as done which ought to be done.

If two persons make a loan of different and distinct sums and take a joint mortgage for the security of both debts, they are not joint tenants, but tenants in common, and the "jus accrescendi" consequently does not take place.

And so is the rule even if they foreclose the Mortgagor.

Of the interest of the mortgagor's wife in the premises.

As the wife may bar her right of dower by joining her husband in a fine or common recovery, so in the same way she may incumber it with a mortgage.

Her right of dower is there postponed to the mortgagee; but her right of dower is paramount to

1 Ch. ca. 241.
1 Vern. 213.
2 Bac. 228.

3 Bac. ante
2 Vent. 343.
1 Vern. 1 Vern.
191. Pow. 317.
1 Eq. ca. ab.
316—

same ante

1 Ch. ca. 119.
Pow. 315.

that of the Mortgagee when the mortgage is made by the hus=
=band alone.

A jointress of lands mortgaged by the husband may redeem, and she and the representatives shall retain possession until they are repaid the whole of the principal and interest, which she has paid for the redemption. This supposes a case in which she has not joined to incumber, for in that case she must bear her proportion of the burden i.e. 1/3. This rule holds only (says Mr Gould) when a ~~mortgage~~ jointure is made by the husband after the land is mortgaged, i.e. the mortgage is prior to the jointure.

This rule holds when the jointure is in arti=
=cles executory, and is not executed by a deed of settle=
=ment.

And if after such executory jointure the hus=
=band mortgage to one without notice she has only the right of redemption.

If after marriage she joins in a fine to a mort=
=gage she must on redeeming pay her proportion, i.e. 1/3, and during her own ~~estate~~ if she do not redeem she must keep down the interest.

If the Mortgagee gives ~~fresh~~ further credit on the same security to the Mortgagor, not having no=
=tice of an intervening jointure, he may tack his last

Comp. 280.
Fil. & R.
Ch. 227—

2 Vern. 683.
2 P.W. 364.
2 Co. 94—

same Au.

1 Atk. 606.
3 P.W. 229.
Tab. 138.
2 Atk. 525.
1 Br. Ch. 326.
Contra. 2
P.W. 400.
P. Ch. 127—

P. Ch. 133.
133. 2 Vern.
403—

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sum and hold for the whole, against the jointress.

But a jointure in mortgaged lands, settled after marriage and merely voluntary i.e. without consideration is void ~~without~~ against the subsequent Mortgage, even if he had notice.

If a husband before marriage gives his wife a bond, conditioned to have her a certain sum at his death, and she survives him, she may redeem his mortgagee in the character of a creditor.

If a husband takes a mortgage in the joint ~~name~~ names of himself and wife, and he dies first, she is entitled to the whole of it, if there are assets to pay debts without it. Either, if the assets are insufficient to discharge the debts.

On a mortgage in fee, the Mortgagor's wife is not entitled to dower in an equity of redemption; therefore a dower can she can never redeem for the husbands equity is considered in the nature of a pure trust of which there can be no dower.

But a husband may have courtesy in his wife's mortgages. And in Con. it has been determined that a wife may have dower in the husband's equity.

In Eng. the wife is entitled to dower in the reversion expectant on the determination of the estate a term mortgaged

Pow. 334.

Co. Lit. 57. a.
4 Vern. 57.
2 P.W. 167.

Stat. Con.
265.

Talb. 41.
1 Vern. 61.
1 Roll. 875.
1 Eq. ca. ab.
381.

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for the termination of the term reverts the estate at law.

Of Mortgages by Husband and Wife of her freehold and his ~~to~~ interest for the mortgage money due to her.

A husband by marriage obtains no other interest in his wife's estate of inheritance than a freehold, during their joint lives unless they have issue in which case he obtains an estate for his own life by the courtesy. ~~He~~ cannot therefore make a Mortgage of her freehold, for any larger period than that for which he holds. If therefore he should mortgage the estate for 500 years it would cease on her death.

At Com. Law the rule is the same even if the wife joins her husband in a deed of her own inheritance, unless the joinder were in a fine ~~and~~ recovery or recovery.

In Con. the husband and wife may by their joint act i.e. by deed, alien their inheritance, and of course they may mortgage it.

And in Eng. if the wife joins her husband in levying a fine, either for the purpose of liening or mortgaging her inheritance it will be binding upon her and her heirs, her coverture notwithstanding.

But acts of the wife after coverture amounting to

Doug. 5 B.
Cowp. 201.
Peake 154.
2 P. W. 127.
2 Ves. 526.

Pow. 342.

Pow. 343.
1 P. W. 264
2 Vern. 604.
6 Bq.

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a new grant or resecution will give validity to a mortgage made by her husband and herself or by herself alone during coverture tho' the mortgage be by deed — and this is not on the ground of her deeds being voidable, for ~~the~~ her covenants are absolutely void without exception (where she makes a lease for years) but on the ground of it's being a new execution or redelivery.

If the wife joins in a fine to ~~lease or mortgage~~ secure a mortgage of her estate, and the mortgage is forfeited, the estate will be holden by the mortgagee not only for the original sum borrowed but if a farther sum be borrowed it will also be holden for that.

The principle on which the courts have decided is, that the Mortgagee has by the Mortgage the legal title, and in addition to that as much equity as the wife or heir has to be restored ~~to be restored~~ to the possession, and where the equity is equal the legal title shall prevail.

But on the other hand if the wife's land is mortgaged to secure the husband's debt, his personal estate shall first be applied to the discharge thereof, tho' she hath levied a fine; even in exclusion of the claims of his legatees; for the mortgage being originally the debt of the husband the wife. By consenting to charge her lands with it, she does not make it less so, than it was before.

From the foregoing it will follow that if the wife joins

1 Vern. 644.
Eq. 213.
Pow. 346.

2 Atk. 84.

Pow. 348.
1 Eq. ca. 68.
2 Vern 501.

Pow. 349.
350. 2 Atk.
444.

Pre. Ch. 63.
Pow. 350.
1 Eq. cab. 70.

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in incumbering her jointure to secure her husbands ~~estate~~. do tho she does not absolutely ~~part~~ part with it, but will reproper it upon dis=charge of the incumbrance —

If the wife joins in incumbering her own estate to disin=cumber her husbands, and he dies first, she will as to the heirs be considered in Eqa. as standing in the place of the Mortgagee, and entitled to the benefit of his assets, for she is virtually consider=ed as a purchaser of her husbands estate, tho her estate is liable to the Mortgagee —

If a feme sole being a Mortgagee marries and her husband upon the marriage makes a settlement of his own estate upon her, in consideration of her fortune; this settlement will be considered as a purchase of the mortgage — If she dies first it will go to him but if ~~she dies~~ he dies she living it will go to his representatives and not survive to her —

But this rule does not hold in case of a voluntary settlement after marriage, for observes Ld Hardw. the hus=band does not in this case become a purchaser of that acces=sion of fortune and the ground which he went upon was that there was no contract on the part of the wife, for after mar=riage she was incapable of contracting —

If a settlement be made upon the wife before marriage, but in consideration of the whole ~~and in such~~

Pow. 351.

2 Vern. 68.
1 Eq. c. ab. 68.
Pow. 352.

Pow. 352.
P. Ch. 482.
2 Vern. 501.
1 P. W. 458.

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part of the fortune only, it will do away the general presumption that it was in consideration of the whole, and in such case it is apprehended, that what is not specially conveyed to the husband will survive to the wife.

And upon according to the above rules an actual settlement made by the husband would amount to a purchase of the wife's fortune, an executory agreement will amount to a purchase even tho' the wife should die before an actual settlement had taken place. If in this case the Husband had been guilty of no default or neglect the portion will go to the husband or his representatives.

But it is to be observed that this executory agreement would be enforced against him in favor of the heir in a Court of Chancery. P. Ch. 312. 1 Eq. c. ab. 70.

If a settlement made by the husband in consideration of the wife's fortune falls short or does not amount to what was agreed upon, it will in no wise be considered as a purchase, but she will hold the whole against her husband's creditors.

Further where the wife is mortgagee the husband is entitled to the mortgages as he is to her chases in action if he reduces them into possession during coverture.

And an alienation or an assignment of the wife's mortgage by the husband (she being mortgagee) will be binding if

2 Vern. 401.
170. P. Ch. 114.

1 P. W. 454
3 Do. 197 —

1 P. W. 454.

1 P. W. 382.
459. 2 Bl.
315 ——

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made for a valuable consideration, for this act is considered as equivalent to reducing the mortgage into possession. But if the alienation or assignment is merely voluntary i.e. without consideration, the assignee &c has no higher claim to the estate of the wife than the husband or his heirs would have had, had there been no assignment made.

If the husband's creditors get possession of the wife's mortgage, so that she is obliged to apply to a court of Chancery for relief. Such court will not interfere so as to take from them any legal advantage which they may have acquired. As in case of an assignment by commissioners of bankruptcy. They have the evidence of a legal title in themselves, and as high an equity as she has, for the husband might have disposed of it to his creditors.

On the other hand if the wife herself or her trustees have possession of the title deed, equity will not interfere in favor of his creditors when there is no remedy at law against her.

But if the husband will make some reasonable provision in her favor the court will interfere, and Mr Gould thinks that the bankrupt's creditors have the same right.

2 Vern. 270

2 Atk. 207.
3 P.W. 364.

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But tho' the court of equity will not interfere against the wife in favor of the husband's assignees, yet it will in favor of a specific assignee of the mortgage by the husband for a valuable consideration. It will not interfere in favor of creditors who have only a general lien on the husband's property, but only in favor of those who have a specific lien.

A mere executory agreement by the husband to assign for a valuable consideration his wife's mortgage, as a security for a debt, without a delivery of the deeds will bind the mortgage pro tanto i.e. to the amount of the debt for which the assignment was made.

Out of what funds Mortgages are to be redeemed

There are some general rules on this subject which are important, and which if thoroughly understood will greatly elucidate the particular cases which have been determined.

It is a general rule in equity, that the fund which has been increased by contracting a debt, is in the first instance to be charged with the payment of such debt. Thus the mortgagor's personal property having been benefited by the debt is first to be applied to its reduction.

3 Atk. 449.
Talb. c. 54
Pr. Ch. 61.
3 P.W. 348.
1 Eq. ca. ab.
2 Eq.

Pr. Ch. 477.
1 Atk. 487.

1 Vez. 51.

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If there are personal assets, the Exr. is compellable in Ch. to advance the redemption money for the benefit of the heir. If there are assets the heir does not take the estate cum onere. This proceeds on the above rule laid down.

This rule tho' general is not universal, for it may be qualified and altered by the intention of the Mortgagor.

Farther if the Mortgagee should sue the heir of the Mortgagor upon the bond (which in Eng. is usually given) the heir may in Chancery compel the executor to advance the assets and satisfy the demand in suit.

The devisee of the Mortgagor who is quasi an heir is entitled to the same privilege; he is not indeed Haeres natus, but quoad ad hoc he is Haeres factus.

If then the Mortgagor bequeaths his personal estate among his relations, it must still according to the general rule be applied to the benefit of the heir. for the Mortgagee's claim is a debt and the claims of creditors are prior to those of legatees, they being mere volentiers.

But if the testator directs otherwise the preceeding rules do not hold, and the heir or devisee takes the land cum onere.

So far is the principle of the prior liability of personal property pursued, that even if the real estate is charged generally with the payment of debts, such charge

1 Dez. 54.
12.2 0 0.
2 Dem. 718.
P. Ch. 451.

Pr. Ch. 61.

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renders it liable only in case of a deficiency of assets —

If however the real estate be so charged as to make it manifest that the Mortgagor's intention was that it should be applied in the first instance, it will be so applied. Ex. gr. Land devised to A. to be sold for the payment of debts. +

To apply this rule — The Mortgagor devises his real estate to B. and his personal to C. Mr. and dies leaving debts unpaid; now all the personal estate is first to be applied, to the redemption of the mortgage — Aliter if a contrary intention or intent is clearly manifested —

In Con. these rules are not so important as in Eng. for here the real property in general descends to the same persons who enjoy the personal property and here all the property of the testator or intestate is liable for all his debts whether due on specialty or simple contract — It is understood however that personal is first liable —

This general rule is never suffered to operate in favor of the heir, to the prejudice of any creditor, tho' his debt is by simple contract, nor even against general legatees.

The rule last laid down never to clash with one laid down before, respecting the liability of personal property bequeathed among the relations of the testator — Indeed it is plainly contradictory to it, tho' this "oppugnation" is not

Pow. 377, 385.

Pow. ante.
Talb. 53.
2 Ch. ca. 4.5.
1 P. W. 693.

Pow. 378.
Talb. 53.
1 P. W. 678.
3 Ch. 403.

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taken notice of by any law-writer. It might be reconciled on the hypothesis that the bequest referred to, among the relations of the testator, was entirely void on the ground of uncertainty, and of course as if there was no bequest at all. But Mr Gould does not positively lay it down that this is the proper explanation, because nothing in the reported case expressly warrants it, and if it was void on the ground of uncertainty, the report of the case would probably have noticed it particularly.

Mr Gould observes that Mr Powell uses the word ~~generally~~ general in contradistinction to ~~the~~ residuary legatees, and not as distinguished from specific legatees.

To return to the main subject. If the personal fund is ~~be to~~ exhausted by specialty creditors; the simple contract creditors and general legatees may come upon the real estate *pro tanto*, for so much as the specialty creditors have taken from the personal fund. So that in equity simple contract and general legatees are preferred to the heir.

This rule holds also in favor of simple contract creditors and legatees against the Mortgagor's devisee; unless the devise is specific in which case it does not hold as to legatees but merely as to creditors by simple contract for a specific devise is postponed to a simple contract creditor but not to a general legatee.

Where the descent is broken, and the heir of the

Salk. 418.
1 P. W. 201. 681.

1 Equ. ca. 98.
1 P. W. 127.

1 P. W. 539.
2 Vez. 422.

2 P. W. 386.
1 Bro. Ch. ca.
252. 461.

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Mortgagor is made to take by purchase under a devise. he stands in the same situation as a common devisee. specific or general as the case may be

By the descents being broken in mind such a disposition of the estate that the heir cannot take it as heir; for if the estate be so disposed that the heir might take it as heir, he must take it as heir, for he must be under his better title. A case of a descent being broken, is when a tenant in fee in Eng. devises to his eldest son (who is heir) in tail.

But notwithstanding the general rule, the heir of the Mortgagor is not entitled to the aid of such of his ancestor's personal property as is specifically bequeathed; and even money if so situated that it can be identified may be specifically bequeathed.

To render a bequest of personal property specific, it must be clearly, certainly, and exactly identified or defined.

In pursuance of the general principle, it is a rule tho' the Mortgagor devises his estate to one "with the incumbrances thereon" yet the personal fund is (under the preceding qualifications) liable to disencumber the real estate bequeathed unless there are other other words which clearly manifest an intention that the devisee shall take the estate cum onere. The words "with the incumbrances thereon" being descriptive of the particular estate bequeathed and not limit

Pow. 393.
2 Atk. 404.

Pow. 412.
1 Bro. Ch. 401.

1 Bro. ch. ca.
58. 454.
1 W. 347—

Mortgages.

=tative of the interest devised.

And if it clearly appears from the instrument of devise that it was the intention of the devisor that his devisee should hold the es=tate disencumbered, then the heir must pay the incumbrances out of the real property after the personal estate is exhausted.

If the Mortgagee sells his equity of redemption, the heir of the assignee, or purchaser has no claim upon his (the purchaser's) fund to disencumber it, for the personal fund of the purchaser has not been benefited nay it has been diminished and the real estate enlarged.

The rule is the same as to the devisee of such purchaser. So also if the money due on mortgage is not the debt of the own=er of the equity of redemption, the estate mortgaged shall itself on the death of the owner bear the burden; and the heir or devisee of this owner shall not have the aid of his per=sonal fund but if he will have the land, shall disencum=ber it himself. In this case it is evident that the assets of the owner of the equity have not been benefited and of course they are not liable.

Of the payment of the interest of money due on Mortgage.

In Eng. the legal rate of interest is fixed by a stat. of

Pow. 421.
St. Can. 481.

2 Mod. 307.
Doug. 223.
4 Burr 2253.
2 T. R. 241.

2 Atk. 154.

3 Atk. 727.
1 Ves. 428.

Pleh. 160.
Barnard. 481.
3 Atk. 520.
3 Bl. 432 —

Mortgages.

Ann. to 5 p^c. cent p^r annum. In Con. it is 6 p^r. cent.

It is a general rule in all contracts, mortgages as well as others, that the reserving more than lawful interest makes the contract void. The receiving more incurs the penalties of the statute.

But tho' the reserving more makes the contract void it does not of itself incur the penalty, nor does the receiving more of course under the contract void.

Ld. Hardwicke has said that if a mortgage be made for 5 p^r. cent and the Mortgagee receives 6 p^r. cent the mortgage is void. In this he must intend a reception of more in pursuance of a private original agreement between the parties, or a receiving at the time of the loan, which is a reservation.

The same chancellor has also holden that a deed given in Eng. mortgaging an estate in the west indies (where 8 p^r. cent is allowed) is usurious if more than 5 p^r. cent is reserved. Here he must allude to cases in which the payment was to be made in Eng.

In Chan. an arbitrary distinction has been adopted between an agreement to pay 4 p^r. cent interest with a clause of enlargement to 5 if the Mortgagor does not make punctual payment, and an agreement that 5 shall be paid with a clause of reduction to 4 in the event of punctual payment

Pow. 422.

P. Ch. 161.
2 Vern 134.

1 P. W. 652.
3 Bro. p. ca.
68.

1 Vern. 169.
2 Atk. 135.

3 Atk. 271.
1 Vern. 168.

Mortgages.

The latter agreement is enforced in Chan., the former is not, for says the court it is in the nature of a penalty, this distinction says Mr Gould is frivolous & without ~~a difference~~ a real difference and subject to perpetual ex==ion.

It is agreed that the covenant to pay the additional one per cent is good in equity and it is not approved to be necessary that the covenant be in a seperate deed from the Mortgage.

An agreement to raise the interest from one sum to another (not exceeding lawful interest) in case of non payment is good in Chancery, if an indulgence be given ~~to~~ by the Mort=gagee to the Mortgagor, and such indulgence is the considera=tion to the contract; for in this case the agreement is con=sidered as a liquidated satisfaction for such forbearance & not as a penalty.

Compound interest is not regularly allowed either in Cha. or at law. P. Ch. 116. 2 Atk. 331. 1 P. W. 652.

But if the Mortgagee assigns his interest with the concurrence of the Mortgagor all the money paid by the assignee (including interest as well as principal) shall be accounted principal and draw interest. This is in the na=ture of a contract between the Mortgagor and assignee that the latter shall pay the debt of the former.

But if such assignment be made without the

1 Geo. ab.
329.

1 Ven. 168.

2 Ven. 185.
P. Cr. 116.
Pow. 429.

1 P. W. 478.
453. 376.
Pa. Ch. 500.

Mortgages.

concurrence of the Mortgagor, the assignee has no claim for more interest than the Mortgagee had for this is not such a contract between the Mortgagor and assignee as in the last case.

The assignee will not draw his compound interest unless the assignment be bona fide and the money actually paid, for a mere collateral assignment to obtain compound interest is of no avail.

When on the assignment by the Mortgagee an account is taken between the Mortgagee and assignee of the money due from the Mortgagor this account is not binding upon the Mortgagor.

It was once holden that the Mortgagee should have compound interest when the estate was forfeited. This is now exploded. The report of a master in Chancery computing interest on the suit pending between the parties, converts that interest into principal, from the time the report is confirmed by the Chancellor, for such report so confirmed is in the nature of a judgment at law.

But a master's report when made against an infant, does not in all cases convert the interest into principal: It never does when the infant is Deft in a suit, for in that case the infant is never guilty of any neglect in not having previously satisfied the claim of the Mortgagee ac-

1 Vern. 392.
2 d. Ry. 25.
2 Bro. ca. 56.
4 V. 447.

1 Eq. ca. ab.
2 87.

1 P. W. 652.

Salk. 449.
2 Atk. 331.

Mortgages.

=cording to the master's report.

If however the infant is Plff in Cha. the account made up against him by the master does not turn the interest into prin=cipal; for in that case the Deft. is driven into court by the infant, the decree passes as to him in invitum, and he may take what advantage he is able of the situation in which he is placed by the Plff.

Again if an infant entitled to the equity of re=demption agrees to pay compound interest, for the sake of procuring some substantial benefit to himself, and does actually procure it he shall be bound by such agreement.

A mere signing or acknowledgement by the Mortgagor that somuch is due on interest, does not con=vert that interest into principal; for interest is not to be computed on interest except after a report of a master confirmed.

And an express agreement at the time of making the mortgage to pay compound interest is not binding; for it is treated as prima facie oppressive; But after interest has actually accrued such agree=ment would be good.

A tenant for life of the equity of redemp=

Pow. 442.
2 Eq. ca. 596.

1 Vez. 477.
3 P. W. 285.

2 Atk. 427.
Salk. 567.
1 Vez. 477. 486.

Mortgages.

=tion is compellable by the remainderman or reversioner to keep down the interest during his own possession: Indeed the remainderman may indirectly compel him to redeem by purchasing in the incumbrance himself and then if the tenant will not redeem, he must abandon the possession.

On redeeming the tenant must pay 1/3 of the original debt — the remainderman must pay the remain=ing 2/3.

But the tenant in tail of the equity of redemp=tion tho' in possession is not at all compellable to keep down the interest during his own possession neither by the reversioner, remainderman or by his own representa=tives; for he has all those in expectancy in his power — and may forever conclude them by levying a fine or suffering a common recovery: Indeed his estate may by propitious chance forever & certainly must endure while he has heir of his body.

Still if such tenant in tail be an infant his guardian must keep down the interest during his mi=nority, for the infant while such, cannot bar the remain=der, unless it be under the King's privy seal which will never be used for such a purpose.

1 Bro. Ch. 218.
1 Vez. 477.

1 Ven. 150.
Id. Ch. 158.
P. Ch. 209.
Pow. 453

Mortgages.

If however the tenant in ~~fact~~ tail in fact does keep down the interest, the remainderman or reversioner shall have the benefit of it. The reason of this probably is that there can be no proportion established between the value of a tenancy ~~for life~~ in tail and an absolute fee.

If the first Mortgagee takes possession and allows the Mortgagor to receive the profits without applying them to the payment of the interest, still in favor of a second Mortgagee, the profits thus taken shall be applied to the ~~interest~~ payment of the interest, on the debt due the first Mortgagee.

When a bond is given to the Mortgagee, the holder of the bond has a right to receive the whole debt, principal and interest, and the giving up the bond extinguishes the debt. But the holder of the Mortgage deed has no right to receive more than the interest, and his giving up the deed will not extinguish the debt, but the Mortgagor is still liable for it, to the holder of the bond. Indeed it is difficult to assign the reason why the mere holder of the Mortgage deed should be entitled to receive the interest, but it probably arises from the fact that he has ~~the~~ no power to obtain the possession of the premises.

A tender of the money by the Mortgagor after the

2 P.W. 378.

2 Ves. 372. 678.
3 Atk. 90.

1 Eq. ca. 316.
1 Ves. 339.

Mortgages.

day of payment has elapsed, is of no avail at law. But in equity if after forfeiture the Mortgagor makes a tender to the Mortgagee, who refuses to accept it, and if the Mortgagor has given notice of his intention to pay, 6 months previous to the time of his making the tender, the Mortgagee loses his right to the interest from the time the tender is made.

Such tender will also bar the right to recover interest of the devisee of the Mortgagee; and probably also of his common assignee.

But in this case the Mortgagor must make oath that he has retained the money, from the time of making the tender, ready to be paid to the Mortgagee, and that in this interval he has derived no advantage from the money. This is in analogy to the rule of law respecting tender.

It is a general rule that the tender thus made must be strictly legal or it will not bar the Mortgagee's right to interest.

But the tender of a bank bill has been decided to be sufficient, when the Mortgagee had no objections to receiving it, on the ground of its not being a legal tender & ~~an~~ the Mortgagor offered to ~~change it~~ exchange it if the Mortgagee wished. This decision is questioned by Powell.

Co. Lit. 211.
210. 212.
2 Eq. c. ab.
607.

2 P.W. 374.

1 Ch. ca. 29.

2 Eq. ca. ab.
60 C. Bath. 90.

Mortgages.

The debt due being a sum in gross, must regularly be tendered to the person of the Mortgagee. The mere contem=plates a case in which there is no place appointed for the payment to be made at.

On the other hand if place and time are appoin=ted, the Mortgagor cannot make a tender at any other time or any different place; But a tender at the time and place appointed is good - even if the Mortgagee is not present.

In equity if no place is appointed, and the mort=gagor gives notice where he will make payment - a tender at that place is good, if the appointment be a reasonable one and no objection is made to it at the time of giving no=tice.

And it has in one case been decided that when no place is appointed, a tender at the house of the Mortgagee is sufficient. This indeed was a case when the Mortgagee kept out of the way, to avoid a tender from the Mortgagor.

Yet if the Mortgagee has doubts as to any legal question arising from tender he shall be allowed a rea=sonable time to satisfy himself by counsel.

So also when a tender is made by a person claim=ing the equity of redemption he shall be allowed time to investigate the fact whether such claimant is the

6 Bro. P. C.
580 —

2 Atk. 107.
Doug. 266.

1 Vern. 476.
2 Atk. 534.

Mortgages -

real owner of the equity -

Powell says generally that interest on a mortgage (reserved) may be altered by a ~~personal agreement~~ parol agreement subsequent - But the case which he quotes does not support the position; that was merely a case of rebut=ting an equity, which may always be done by parol -

If however the Mortgagor had been Pltff. Wm. says the rule would a undoubtedly be otherwise -

The methods of Accounting

A mortgage being a pledge and not an alienation of the subject, the Mortgagee has no right to the profits, until he takes possession - Of course the Mortgagor re==maining in possession is not bound to account with the mortgagee for the profits; and an additional reason is that the debt due on mortgage draws interest -

But the Mortgagee must account for prof=its received during possession his possession i.e. they are to be applied first to the payment of the interest, and secondly to the reduction of the debt due from the Mortgagor -

The Mortgagee in this case is in the nature

Pw. 466.

1 Vern 816.
3 Atk. 518.
2 Atk. 120.

1 Eq. ca. 324.
3 Bac. 658.
2 Ch. ca. 3.

1 Vern 45.
476. 1 Eq. ca.
ab. 324.

Mortgages.

of a bailiff to the Mortgagor.

If the Mortgagee in possession mages the estate himself he has no allowance for his care and trouble. And all that is meant by this is, that as bailiff he is to have no compensation for his pains; for he is certainly entitled to the clear annual value of the rents and profits subducting the labor and expence employed in producing them.

Even tho' the Mortgagor contract with the ~~Mo~~ ~~Mortgagor contract~~ with the Mortgagee to allow him a compensation as bailiff, such agreement will not be enforced in Chancery.

But it is laid down that if the Mortgagee employs a skilful bailiff he shall be allowed for the compensation made to such bailiff. In Lou. this would not apply tho' in the ~~so~~ southern states it might. Why?

If a mortgagee in possession assigns his mort=gage to a person insolvent, he shall be liable for the prof=its which accrue after, as well as those which ~~he~~ accru=ed before the assignment.

The Mortgagee is to account with the Mortga=gor ~~only~~ for those profits only which he has actually received unless it appears that he might have received more, but for some fraud, or wilful neglect or default in himself.

~~1 Vern. 45. 46.~~
~~1 Eq. ca. ab.~~
~~3 Br.~~ 1 Vern. 240.
P. Ch. 30. Pow.
468. 469.

1 Vern. 267.
3 Bac. 658.

1 T. R. 760.
1 Vern. 267.

1 Eq. ca. 594.

1 Eq. ca. 12.
3 Bac. 659.

Mortgages.

But if the Mortgagee having taken possession keeps other ~~creditors~~ incumbrancers out of possession — he will be charged in favor of those other ~~creditors~~ incumbrancers with all the profits he might have made

It is to be understood that he is not bound unless he has notice of the subsequent incumbrancer —

If the Mortgagee ~~in~~ out of possession permit the Mortgagor to make use of his (the Mortgagee's) legal title to keep other ~~creditors~~ incumbrancers out of possession, he will in their favor be charged with the profits from the time at which they might have had possession without his interference — This is called "Fencing" and is a having the legal title ~~estate~~ in the hands of the Mortgagor, by which he is enabled to fence his interest from the attacks of subsequent incumbrancers —

But if the incumbrancer subsequent were voluntary on the part of the Mortgagor i.e. by his own act, and not by operation of law, he cannot fence against such subsequent incumbrancer —

After the Mortgagee has assigned his interest, a bill brought for redemption against the assignee must join the Mortgagee as a party, for he must account for the profits which he himself has received —

If there are several mortgages the account stated between the mortgagor and the first mortgagee will

1st of Jany 1770 a scale of debt on the first

of Jany 1775 a payment of 25 dollars the interest
of 100 dollars for 5 years is 30 dollars which
being added to the payment on that day the
debt is — 130
that day there is a payment 25
of 25 dollars which subtracted leaves
the debt — 105 due

on the first of Jany 1780 there
was a payment of 30 dollars and
the debt at that time was — 135
interest is calculated on the 5 — 1 Ch. ca. 66. Pow. 472.
subtract the payment of — 30
and it leaves — 105

on the first of Jany 1784 a payment
of 50 dollars was made on that day
when the debt was — 135
subtract the payment of — 50
85

on the first of Jany 1795 after
ten years there is the principal
53 dollars which add is — 53
and on the first of Jany 1805 — 138
there is a payment
of 20 dollars — 51
the interest is then — 187
for no interest is cast on the
ending long only on the 85
subtract the payment — 20
167

on the 1st of Jany 1814 there
was a payment of 120 dollars
add the interest as before — 51
and subtract the payment — 218
120
98

1 Ch. ca. 102. Pow. 472.

2 Vern. 536.

2 Atk. 534.

Mortgages.

will be conclusive on the rest unless there be some fraud proved. This contemplates merely the Mortgagor and the first Mortgagee, and not an account ~~between~~ between the Mortgagor and any subsequent Mortgagee.

But an account made up between the Mortga=gee and his assignee of the debt due from the Mortgagor to the Mortgagee will not conclude the Mortgagor.

After a great lapse of time, and several assignments, the last assignee is not bound to account for the profits be=fore his own time, and they shall be set off against the interest that had previously accrued.

If the Mortgagor after having endeavored to de=feat the title of the mortgagee at law, exhibits a bill to redeem, the expenditures of the Mortgagee in defending his title shall be allowed in accounting.

There are two modes of accounting **I.** By annu=al rests. There are an application of the surplus of the annual rents and profits over the interest to redeem the principal; there are never made except when the prof=its considerably exceed the interest and when allowed it is very advantageous to the mortgagor operating in a manner exactly the reverse of compound interest.

II. By bringing all the profits into one aggregate

The computation of interest as settled by the mutual consent

$100 5 years a payment 25 dollars due $105

a loss of 5 years 40 dollars paid due at the 135

from which subtract 40 95

a loss of 2 years ~~[illegible]~~ 2 months 29

payment 16 13

subtract 16

for 4 years 60 dollars interest 13

~~[illegible]~~ 7 dollars year 66

1 75

7 2

8 5

and so on

~~The other made~~ the

The 3d made 4

100 rds of land ~~[illegible]~~ 1770 at the end of 5 years 1775 25 dollars every

the interest is 30 which subtract from one 2 Part. 196.

~~to~~ 130 dollars leaving 100 the loss of of 5 years 1780

then is a payment of 40 the debt due is 130 leaving

then subtract 40 and there 90 dollars due mutual

is wrot on the 5 dollars after a loss of the year 1790

at which time the debt and interest 130 then is a payment

of ten dollars leaving 120 dollars due after Pow. 475.

a loss of ten years 1800 [illegible] now due

1 Pro. ch. 368.
2 Deut. 365.
1 Kin. 282.

Mortgages.

sum and all the interest into another, and subtracting the less from the greater.

Of Foreclosure.

As Chancery will decree a redemption for the benefit of the Mortgagor, so also it will decree a Foreclosure in favor of the Mortgagee, for the great object is to distribute justice in equal portions to each party.

A decree of Foreclosure is a decree that if the Mortgagor does not pay the debt within a time limited by the court, he shall be forever barred of his equity of redemption. This decree is irrevocable except under special circumstances; It is not peremptory but conditional.

When a reversion is mortgaged the usual practice is not to decree a foreclosure but a sale of the premises. This rule is in favor of the Mortgagee and perfectly equitable for the reversion may fall in at a very distant period, & be of no great advantage to the Mortgagee, unless it be sold. Besides it is commonly more valuable to the owner of the particular estate than to any other person.

If there are several assignees of the Mortgagee or if there are several Mortgagees they must all be parties to

Prov. 476.
2 Ch. ca.
244.

2 Attr. 344.

2 Attr. 344.

Mortgages.

the bill –

A foreclosure will never be decreed till after forfeiture – It is laid down in the books, that on a bill for foreclosure the title of the mortgagee cannot be investigated but must be settled at law. This is very incorrectly expressed, for on such application the fact whether the applicant has the title to the interest of a Mortgagee may be investigated – The meaning of it is that on a bill brought to foreclose Cha. will not aid the legal title of the Mortgagee – The bill is brought for the purpose of barring the equity of redemption, and for that purpose only, and on this bill Cha. can do no more than to order a foreclosure, or deny a decree for that purpose –

A Mortgagee may pursue all his remedies at the same time & the pendency of one, is not pleadable in bar or abatement to the others –

In Con. after judgment is obtained on the bond or personal security of the Mortgagor, the Mortgagee may levy his execution upon the equity of redemption and have it appraised to him – Not so in Eng. for there the equity of redemption is not legal assets –

Under special circumstances Cha. will grant an injunction against an action of ejectment brought by the Mortgagee –

2 Vern. 271.
Salk. 680.

2 Atk. 267.

Pow. 479.

3 P. Wms. 333.

2 Vern. 66.
1 Vern. 367.

Mortgages.

Chancery may refuse a decree for a foreclosure, when injustice would evidently be the consequence of decreeing it.

If upon reference to a master, the Mortgagor does not redeem by the time appointed when he himself has made an application to redeem; and afterwards on the application of the Mortgagee the court on that ground dismiss the bill such dismissal is equivalent to a decree for foreclosure.

If the Mortgagee's heir brings a bill to foreclose it will be cause of demurrer, that the personal representative of the Mortgagee is not made a party to the bill for he is entitled to the money.

So without any ~~money~~ demurrer if it appears upon the hearing that the personal representative is not made a party, the heir cannot proceed.

But unless the mortgage be of a chattel interest the personal representative of the Mortgagor need not be made a party to the bill for redemption; he has no interest in the equity of redemption of a freehold estate.

But if the heir of the Mortgagee has obtained a foreclosure it will bind the Mortgagor, tho' the personal representatives were not a party, and the heir may redeem the land, on paying the Exr. or Adm. the debt.

If the heir does not pay the debt to the personal

2 Vern 67.
367. 193.
2 Eq. ca.
ab. 608 —

Pow. 483.
2 Atk. 101.
1 Ch. ca. 217.

2 Vern. 518.
185. 663 —

1 Eq. ca.
318.

Mortgages.

representative, he may be compelled to convey the land to him; for the principal i.e. the debt due on the mortgage, goes to the personal representative of the Mortgagee, and the incident, that is the mortgage or security to the heir.

In a decree for foreclosure the time allowed the Mortgagor to redeem is computed by Calendar months.

A decree to foreclose a tenant in tail, is binding upon his issue in tail, and all in expectancy.

But if there be tenant for life of the equity of redemption with remainder over, the remainderman is not bound unless unless he be made a party to the bill. The reason of this distinction is probably, that the tenant in tail has all those in expectancy completely in his power, which the tenant for life has not.

If there are several incumbencers, who are not made parties for to the bill for foreclosure, still the first Mortgagee may foreclose such as are not made parties. But those not made parties to the bill are not foreclosed and may ~~not~~ afterwards redeem.

When all the interest of the Mortgagor is devised away the devisee may bring a bill to ~~foreclose~~ redeem, without making the heir of the Mortgagor a party, for the latter has no interest in the Mortgage.

P. Ch. 185.
3 Bac. 148.
2 Vern. ~~342.~~
342. 392.
479.

2 Ves. 28.

2 P. W. 401.
1 Do. 504.
2 Atk. 582.

Pow. 489.
3 P. W. 352.

1 Vern. 295.
2 Vern. 429.
Pr. Ch. 184.
3 P. W. 404.

Mortgages

A foreclosure may be decreed against an infant, but he has a day given in court, after he arrives at full age, to shew cause against the decree – This day in court as it is termed consists of 6 months after he shall have arrived at full age and process to appear to appear and shew cause, shall have been served upon him –

Such a decree then is not in the usual form, for it contains a clause allowing the infant his day in court –

If within 6 months after having arrived at full age, and having process served upon him, he does not shew cause against the decree it is binding upon him, but if he does shew cause, he may on such shewing put in a new answer and make a new defence –

In this case however the infant is not allowed to go into the account anew or of course to redeem on payment of the money – This privilege extends no farther than to enable him to shew that the decree was erroneous or unjust and to enable him to take advantage of that which if known at the time of making the decree would have prevented its being made – Indeed it is said that the proper remedy of the Mortgagee when an infant is owner of the equity of redemption is to have a sale and not a foreclosure of the lands decreed. This binds the infant absolutely and is perfectly equitable.

for the surplus after payment of the debt belongs to the infant.

If a feme sole or her ancestor mortgages lands and the equity of redemption vests in her after coverture, a decree for foreclosure obtained against her is peremptory and of course she has no day in court to show cause against it - for her incapacity is a voluntary and not a necessary one ~~then~~ & she has given her authority to her husband; if however it appears that any injustice had been done her, she may avoid the decree after coverture -

If the Mortgagee has been guilty of any fraud or unfairness in obtaining a foreclosure the court will open the foreclosure which is a revival of the equity of redemption - 9 Mod. 15 3. 1 Eq. ca. ab 600. 609. 5 Viner 476.

Thus if the Mortgagee obtains a foreclosure after a judgment creditor has given him notice of his demand and tender him the money due on the mortgage, the court will open the foreclosure. If however no notice is given the foreclosure will not be opened. Fn. de hoc.

When a foreclosure is opened in favor of a subsequent incumbrancer, the first Mortgagee is allowed all his expenses in obtaining it. This rule tho' laid down without qualification, seems unreasonable when the first Mortgagee knew of the subsequent incumbrancer.

Barnadis.
221.
1 Eq. cab.
605.

1 Ver. 406.
P. Ch. 423.
1 P. W. 291.

2 Vern. 235.
1 Vern. 148.
Salk. 276.

1 Eq. ca. ab.
317.

1 Root. 202.

Mortgages.

Under special circumstances the time limited to the Mortgagor for payment may be enlarged: As when the Mort=gagor without any default or wilful neglect must be greatly a sufferer by a foreclosure.

Indeed one foreclosure has been opened several successive times, and even when the Mortgagor had entered into a rule not to apply again.

A foreclosure is never opened in favor of a mere ~~voluntary~~ volunteer that is the one who has the equity of redemption without having paid any good or valuable con=sideration. As a devisee of the Mortgagor.

If the first Mortgagee obtains a decree against all the parties concerned, and afterwards devises the land to the Mortgagor the foreclosure is *ipso facto* opened.

The reason of this rule obviously is, that the in=terest of the Mortgagor in the lands is inverted; and the Mort=gagee's due to the subsequent Mortgagee is in the nature of an equitable estoppel.

So also if a Mortgagee having obtained a foreclo=sure, sues on his Covenant security, or his bond or note such suit is a waiver of the foreclosure. In Con. a foreclosure with possession taken is a satisfaction of the debt; this however is a decision not conformable to principle.

2 Eg. ca. 177.
519. 1 Br. par.
ca. 414.
2 Ni. 111.
3 Ni. 915.

Pow. 502.

Mortgages.

Regularly a foreclosure is not to be opened when the Mortgagor has acquiesced for several years in the possession of the Mortgagee under the foreclosure.

In Eng. it is the practice when the Mortgagor does not pay within the time limited in the decree to make it absolute ~~of itself~~ by a pathen order. In Con. it becomes absolute of itself.

In Eng. a Mortgagee may obtain a foreclosure however small his debt is compared with the estate. In Con. the debt must amount nearly to the value of the estate. or no decree will be granted. Hence one principle ground of foreclosure does not exist in Con. — Hence arise ~~one~~ a very considerable difference in practice.

In Con. a foreclosure is seldom opened. Mr Reeve recollects only one instance and that where the Mortgagor on his way to pay the Mortgagee ~~for~~ within the time limited fell sick upon the road.

Of Estates in Joint-tenancy Coparcenary and Common.

Joint Tenancy

Where an estate is holden by one individual only, it is termed an estate in severalty in contradistinction to estates holden by a plurality of persons.

There are three kinds of Joint estates, of which we propose to treat in their order. And

I. Of an estate holden in Joint Tenancy. This species of estate may arise by mere act of law as by descent but always ~~may~~ by purchase. It is distinguishable from other joint ~~acts~~ estates by this extension.

An estate given to more than one grantee is of course a Joint-tenancy, unless the deed contains words expressive of the intention of the parties that it should be an estate in ~~Coparcenary~~ or Common.

It is observable that in the state of New York this rule is altered by statute, there every ~~statute~~ estate holden jointly is construed to be an ~~equity~~ estate in Common unless explained to be in Joint-tenancy ~~or coparcenary~~.

The properties of an estate in joint tenancy are derived from its unities, which are four. Unity of Interest, of Title, of Time, and of Possession.

1 By unity of interest is meant that it be one and the same quantity in ~~the grantees~~ all the grantees.

2 By unity of title is intend that the estate must be created by one and the same act of the parties in all the grantees.

Joint Tenancy.

3d. ~~By unity~~ Unity of time, that it must vest at one and the same period in all the grantees.

4th By unity of possession is meant that each owner shall have possession of the whole estate as well as every part and parcel thereof being seized according to the ancient Norman phrase "per my & per tout" by the moiety and by all. Each must have an undivided moiety of the whole and not the whole of an undivided moiety.

From these unities result many consequences & incidents to the estate. Rent reserved on a lease to be paid to one joint tenant shall inure to both. So a surrender a livery of seisin made to one, and an entry made by one, shall inure to both. Indeed of every act respecting the joint estate the act of one is the act of all.

Thus also by the English law in all actions relating to a joint estate, neither joint tenant can sue or be sued without joining the other. Not so in Con. for here a custom has grown up, which has been sanctioned by the courts, that one alone may sue a stranger. This arose from the vast inconvenience of compelling all to sue, when the owners might be separated from each other at so great a distance in this widely extended country.

One joint tenant cannot sue another in trespass for each has a several right of entry. But neither has a right

Joint Tenancy

by himself to do that which may injure and destroy the right of his Cotenant. On this principle by the stat. West. 2. c. 22. it is enacted that one joint tenant may sue an other in waste. So too by stat. 4 Anne an action of account is given which would not lie at Com. law, unless one joint tenant had made the other his bailiff or receiver. This account will be fairly taken and the tenant in possession is compelable to account for the surplus over and above his share of the rent proceeds which he has received, and he is accountable for that only.

By the Eng. law there is incident to all estates holden in joint tenancy, a right of Survivorship "jus accrescendi". This doctrine is rejected in the Mercantile law, and in case of joint ownership of stock on farm in Eng. and in Con. it is entirely exploded.

One joint tenant may at any time convey his estate to a third person (which works a severance) In Eng. however he can never devise it. But in Con. a joint tenant may devise his estate.

At common law no real estate was devisable and in the stat. which rendered it so in Eng. estates holden in joint tenancy were expressly excluded. This was done on the ground that from the very nature of an estate in joint tenancy, a statute rendering it devisable by one joint tenant would be inoperative.

Joint Tenancy.

For say the Eng. books the title of the surviving joint tenant takes effect instanter upon the death of the other; and thus having more agility than any other title can have would exclude the idea of a title being given to the devisee.

By the stat. of wills in Con. and most other states, all estates are made devisable. In those states which recognize the jus accresendi it would be a curious question under such a stat. whether an estate holden in joint tenancy could vest in the devisee. Mr. K. thinks that it would. Sed quere 2 Bl. 186. Co. Lit. 185.

An estate in joint tenancy may be severed in various ways or modes. 1st By agreement of the owners. Before the stat. of frauds and perjuries this was done by making a practical division merely but since the enacting of that stat. (the stat. of Fr. & Pr.) all agreements of this kind must be in writing. It is therefore necessary after the partition is made practically, that mutual deeds of quit claim pass between the joint tenants.

2d By Com. law no one joint tenant could compel the others to make partition of the lands. but by stat. 31 Hen. 8. c. 1. and 32 Hen. 8 c. 32. a reversioner may be compelled by one joint tenant. This is done by bringing a writ of partition. The mode of accomplishing it is as follows; a joint tenant wishing to compel a partition states to the court (either of Law or Cha.) that the estate is holden in joint tenancy. and that he wishes a reversion

Joint Tenancy.

On this the court issues a writ to the sheriff commanding him to take a jury of 12 men, to make partition. This if done fairly, correctly, or not objected to is final.

In Con. the sheriff takes three men only, and his return when one made is of course recorded, and at all events conclusive. This is a great defect in the Con. code and needs correction.

3d An estate in joint tenancy may be severed by an alienation of one of the joint tenants which destroys the unity of title. So by destroying any one of the constituent unities the estate in joint tenancy is itself destroyed. 2 Blac 185.

II. Of Estates in Coparcenary.

This estate is always created by descent, and happens when an estate of inheritance descends from an ancestor to more than one person. At Com. law it includes females only and their legal representatives, to whom the estate descends and as coheirs are termed Co-parceners or more briefly parceners.

By the custom of Gavelkind lands descent is to all the males alike who of course take as Co-parceners.

By the law of Con. all the children inherit as Co-parceners, female as well as male without distinction.

Estates in Co-parcenary must have the unities of interest of

Coparcenary.

title, and of possession, in the same manner as estates holden in Joint tenancy, the unity of time however is not required. For if Pl. dies, leaving A & B. his heirs tenants in Coparcenary and A. dies leaving C. his heir B. and C. are still tenants in Coparcenary, tho' the estate vested at different times — yet the descent must ~~be cast~~ have been cast at the same time.

The coparceners can maintain no action of waste against each other. Partition might be compelled at Com. Law; and there is no jus accrescendi in Coparcenary — These are the most material respects in which it differs from Joint tenancy —

III.

Of Tenancy in Common.

The only unity necessary to constitute a tenancy in Common is that of possession — There need be no unity of time, title, or interest; But the interest of tenants in common is joint as to its possession merely every estate holden by a joint possession, not being a joint ~~tenant~~ tenancy and not coming by descent is of course a tenancy in Common —

Whenever an estate of joint tenancy or Coparcenary is dissolved, so that there be no partition made but the unity of possession continues, it is converted into a tenancy in Common —

Tenancy in Common.

It may also be created by an express limitation in a deed, when the conveyance is explicitly of a tenancy in common.

Each tenant has the whole of an undivided half or moiety of a tenancy in common and not an undivided moiety of the whole as in joint tenancy; but no one knows with of his own seisin. They all therefore occupy promiscuously.

Tenants in common are compellable to make partition by stat. of Hen. 8. There is no "jus accrescendi" in a tenancy in common, and the tenants in common may sue separately in Eng. as well as here. In other respects it agrees with other estates holden jointly.

Lands to be given to A. & B "to be equally devided between them" have been holden to be given them in joint tenancy when the expressions were used in a deed, & in common when used in a will. We have supposed the words ought to be construed alike in both ~~cases~~ instruments.

It is laid down that when one tenant in common is forcibly turned out of possession he may bring an action of ejectment against his co-tenants. It is to be remarked that he can do this merely for the purpose of getting into possession himself, not for that of ousting his co-tenant.

One joint owner of an estate may hold for so long a time as to gain an exclusive title to the estate against the

If A enters on land of B and encloses it and keeps possession 20 years, suppose they never quarrel, one enters for death is the price. Suppose he dies leaving behind a son, what is the rule of action — how is the perception of the property only how is the case then

Tenancy in Common.

other joint owners, tho' in common cases, the stat. of limitations does not run upon this species of estate – This can happen only when the ~~estate~~ tenant in possession holds it by a possession adverse to that of his co-tenants –

See Bl. Comm. from p. 179 to 194 inclusively & the authorities referred to p. 182 –

Devises –

Stat. ~~Ord~~ Ufes
27 Hen. 8.

2 Blac. 875.

Devises.

The term "DEVISES" when properly used, signifies testamentary dispositions of real property. "Wills" are the instruments by which a man conveys personal property.

Devises were in use with our saxon ancestors before the Norman conquest introduced the feodal system in its full rigor. The manner of devising at that time is however involved in uncertainty. By the feodal system all alienations without the consent of the Lord were restrained: Devises as well as other alienations. Indeed the restraint upon alienation by devise, continued long after that upon alienation by deed had ceased.

The introduction of the ideal estate of uses distinct from the legal interest, gave rise to the practice of devising the use; and in a court of Chancery the cestui que use, could compel the trustee to execute the devise and use to convey for his benefit. Stat. West. 27 Hen. 8. But when the stat. of uses had annexed the possession to the use, there uses now being the very land itself became no longer devisable. This consequently exterminated that kind of devising, and brought on the stat. of wills 32 Hen. 8. c. 1. explained by 34 Hen. 8. c. 5. which gave to all persons possessed of lands in fee simple (except it were in joint tenancy) a right to devise with certain restrictions as to the quantity devisable (which were afterwards taken away by stat. Char. 2.) and as to the persons to whom it might be devised. The explanatory stat.

Devises.

of 34 Hen. 8. excepted femes covertes, Infants, Idiots, and persons of non-sane memory. Our stat. in Con. does not except femes covertes.

There is a remarkable difference between the construction of words in deeds and wills. In a will certain words which if used in a deed will convey no interest, will convey an estate.

In a deed the words "heirs" is necessary to create an estate of inheritance; but in wills any words expressive of the intention of the testator to create such an estate will have that effect. The general rule is that the intention of the testator is to govern. But this may be understood too broad, for no estate can be conveyed by deed. The stat. of wills confers no power upon a testator to create a new estate; but merely to dispose of his estate under the previous restrictions which existed upon the alienation of lands by deed. This rule understood with the preceeding qualifications is very important in devises and will solve a great number of cases which have been decided.

The rule then is merely this that in the construction of wills technical expressions yield to the intention of the maker of the instrument; in that of deeds they prevail.

This rule however says Mr Fo. will not warrant executory devises which were unknown at Com. Law and they may be considered as an exception to the general rule.

It is not Mr Reeve's intention to explain executory devises

Devises.

in this place, but he will just mention the manner in which they originated. At Com. Law no estate of freehold could be made to commence in futuro, and if a remainder was limited, it was necessary that there should be some intervening estate to support it. Courts however took upon them to determine that by devise such an estate might be created without any intervening estate to support and this they termed an executory devise.

The operation of a will may be very different upon real & personal property. Suppose A. makes a will giving all his real estate to B. If he afterwards purchases real property it will not pass by this devise but if he gives all his personal property to B. all that he dies possessed of will pass. A will then operates upon real property from its date upon personal property from the time of the Testator's death.

The effect of a republication of a will is to give it efficacy from the time of its republication and is in effect giving it a new date. A devise then of all real property made before the purchase of ~~the~~ other estate of the same description, & ~~republish~~ republication after such purchase, will operate as well upon the property intermediately bought as upon that originally devised.

Wills are inoperative until the death of the testator. They are therefore ambulatory, liable to revocation express and im-

Tuch. 145.
1 Mod. 177.

1 Bl. Rep. 51.
1 Mod. 177.
Burr. 1131.
1 H. Bl. 30.
Bw. D. 85.

Poph. 91.
Cro. E. 58.
Co. L. 41.

Devises.

=plied – Indeed before the stat. Charles 2, they might be revoked by parol when such revocation was made ~~voluntar~~ solemnly and "animo revocandi"

No particular form of expression is necessary in a will under the Eng. stat. it has been questioned whether a possibility i.e. an estate depending upon a contingency could be devised, formerly it was holden that it could not but must go to the heir; but it is now settled that they are devisable even before the contingency happens –

If an estate were granted to B. and his heirs pur autre vie, his heirs would take it during the life of the cestui que vie. Now as the word "heirs" in this case is merely a word of disinstion, it would ~~seem~~ seem that the owner might dispose of the estate by devise – But by the English stat. estates pur autre vie are not rendered devisable, and it therefore remains as at Com. Law – Now by the Stat. 29 Car. 2. c. 3 sect 12. (Fr. & Pow.) estates pur autre vie may be devised by a will having the requisite of that stat. Pow. D. 35 – Act 10.

In Com. all estate is devisable and hence such an estate would consequently pass by devise – Even in Eng. in those places where all lands were devisable by custom, this kind of estate might be devised –

1 Burn. 548.
Vide Pow. on
D. from P.
12 to 33 —

Show. 545
553.

Cro. Eliz.
1 Ver. 187.

Devises.

Subsequent to the original stat. of devises made in the reign of Hen. 8.; the stat 29 Car. 2. renders other solemnities requisite to the validity of of a devise — This last stat. has been almost universally copied by every state in the union with ~~many~~ very few variations —

There were a number of cases under the stat. of Hen. 8 before the stat of Car.

1st. It was contended between those periods that the whole of a will should be made and executed at the same time but it is now settled not to be necessary, for part may be written at one time and part at an other, and the will or devise will be ~~good~~ good —

2d. In case a man has three or four or more wills which contemplate distinct pieces of property and are all therefore perfectly consistent with each other, they will all be good; but if the last differs or is inconsistent with a former one, it of course revokes it —

3d. There is a cap however where the latter will seems to be in some measure inconsistent with a former one, and yet both shall stand as where B. makes a will by which he gives black acre to A. this being all his property he afterwards marries and wishes to give some estate to his wife, instead of making a new will entire, he makes another giving black acre to his wife

for her life upon the condition of her praying to A. 50£ p^a annum. This last "Will", will operate as a revocation pro tanto i.e. for the life estate given to the wife.

4th. An other point settled during that period is that a will may be made to take effect referring to another writing and disposing of an estate according to that writing without inserting in the will what that writing ~~contained~~ contains. As a will conveying to such a person such property as is mentioned in a certain instrument of writing &c

We have just remarks in this place that a Codicil to a will is nothing more than an addition to a will ~~which~~ which will become a part of it, and will add, explain, or subtract from the will to which it is an addition.

5th. An other point settled at this period is that where a man mentions in a letter to a friend the way in which he shall dispose of his property, this letter shall be his will.

6th. Where the devisor may be in such a situation as to render the writing of his will at the time ~~impossible~~ present impossible, but gives the manner in which he wishes his property to be disposed, to an attorney, who having written it brings it for approval to the testator who at that time is incapacitated to approve. This was (on the presumption that the attorney ~~has~~ obeyed his instructions) determined to be a good

2 P. W. 291.

1 P. W. 740.
2 Atk. 268.
285. 2 Ves. 189.

will. These questions and difficulties however occasioned the second stat. of wills in 29 Car. 2.

This stat. declares 1st that all devises of lands, devisable either under the stat. of Hen. 8. or by custom should be in writing.

2dly That they shall be signed by the Devisor himself or by some person in his presence and by his express direction.

3dly They must be attested and subscribed (i.e. witnessed) in the presence of the Devisor. and

4th This must be done by 3 or more credible witnesses. This is all the stat. requires & altho' these requisites appear to be so very plain yet almost every word and every syllable have been subjects of litigation. This stat. has made no alteration in the form of draughting Wills. No technics are necessary. The intention of the testator must be perspicuously expressed.

A will when made in a foreign country, the devisor omitting the stat. requisite from an ignorance of them, will be good. ~~But when this ignorance will not prevail~~, All devises tho' made in a foreign country must be made according to the ~~country~~ laws of the country where the land lies.

It is common for men in making devises to give power to other persons to dispose of certain property.

The property here passes by the first will, and in case the will made by the trustee or confidential person

1 Mod. 219.

2 Stra. 964.
1 Wil. 318.

1 Doug. 229.
Bright v. Price

Devises.

should want any of the legal requisite it will not be good. The will to the appointees must have the legal requisite.

We have will now consider these requisite in their order, and

I. That the "devise" should be in writing needs no commentary. But

II. That it shall be signed by the devisor or by some person in his presence and by his express direction needs some consideration. With respect to signing what is it? Where the devisor ~~wrote~~ writes his name at the begining of the devise it is sufficient. In this case three of the judges determined that reading was signing within the stat. The name must be in the devisor's hand writing.

The next question was supposing an other man had written the whole devise and the devisor had himself read it. would this reading be a signing within the stat.? It has been determined that it would not.

An other question has been made suppose a devisor attempts to sign and cannot thro' incapacity it will not be good. The rule is that whenever you have complete evidence that the devisor intended to sign and did not, it will not be signing, but where he writes his name at the top and there is no evidence to sign

Parsons vs
Cooke ——
1 Ch. Rep.
2 P. W. 506.
2 Ver. 454.
3 P. W. 253.
2 Atk. 142.

Caith. 81.
1 Salk. 394.
1 Bro. Chca.
99.

1 P. W. 740.

of an intention to sign at the bottom, it will be a sufficient signing

III. A third requisit to the validity of a devise is that it should be attested and subscribed, in the presence of the Devisor. For what then do they attest? 1st. To the corporeal act of signing by the devisor. 2d. It is said that witnesses attest to the sanity of the devisor tho' Mr. Reeve supposes they do not.

But what is attestation to signing? It is settled that an acknowledgement by the devisor to the witnesses, that he himself did sign the will is sufficient to enable the witnesses to prove the will altho' they themselves did not see it signed.

Any thing short of this acknowledgement in their way will not validate a devise.

But the witnesses must be in the presence of the testator. What then is to be construed "in the presence of the testator". It has been settled that if the subscribing was done in the possible view of the testator it will be sufficient i.e. if the testator could have seen the witnesses sign it it will do.

But if the testator could not have seen, it will be insufficient for it has been said and it is probably law, that altho' the witnesses were in view but secreted themselves at the time of signing lest the testator should alter his mind, this fraud vitiated the devise.

Doug. 229.

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It has also been determined that where the testator was surrounded by curtains, and might have seen the witnesses sign it would be a sufficient signing in his presence for he might have had a view.

Altho' the witnesses do subscribe in the corporal presence of the testator; yet if he was deprived of his mental faculties, so as to incapacitate him to exercise them, it will not be subscribing in his presence as contemplated by the stat. There must be a capacity.

How the subscribing is to be proved, when the question comes up at law.

The fact is the witnesses may not only swear to the testator's signing but also to their own subscription.

There is a great convenience in all the witnesses being present at the time of their subscribing, for if this is the case one may prove the whole i.e. the signing of the testator and the witnesses.

There is an inconvenience which sometimes occurs and which is sometimes insurmountable. Indeed many wills are thereby defeated, and it is where the witnesses are all dead; it is true that in this case you may prove the handwriting of the Testator and also of the witnesses but this does not prove that they subscribed in the pres

2 Stra. 1109.

Devises.

=sence of the testator. This in fact is not proved. The courts in such cases lay hold of all the circumstances of the case and from these may infer the subscribing in the presence of the testator. But where there are no such circumstances from which such inference may be drawn the courts will presume the instrument to have been regularly executed.

But suppose that there is one witness alive and he did not see the other subscribe? In this case the handwriting of the other witnesses must be proved. However the Mr Rowe does not see why this proof should not be admitted altho' it has been "questio vexata" in Eng. Parol proof will clearly be admitted.

But suppose one witness comes into court and swears to all the requisite to the validity of ~~the will~~ the will i.e. that the testator signed and that himself and the other witnesses subscribed in his presence, and another witness swears directly the contrary? In this case the credibility as to the fact in dispute will be judged of by the triers. But courts are so much inclined to favor the due execution, that one witness swearing to it, when supported by circumstances has been believed in preference to two who swore directly the contrary.

But it is held that those witnesses attest not only

Carth. 34.
1 Show, 68.

Devises.

to the fact that the testator did sign but off to his <u>sanity</u> at the time of signing and yet strange to say these same witnesses will be allowed to prove his <u>insanity</u> — to contradict themselves — The fact in their testimony may be rebutted by that of others and the matter will be left with the triers — Stra. 1096. 1 Judge Bl. rep. 365. Strong case —

There is a case which seems to contradict the doctrine that witnesses may contradict themselves — Burr. 1224.

As to the number of witnesses.

The stat. declares that there must be three or more witnesses. <u>Cases</u>. 1st A <u>will</u> made having <u>two</u> witnesses and a Codicil thereunto annexed with two witnesses —

Now such a will as this has been held not to be good upon the ground that those who witnessed the will knew nothing of the Codicil it being on a seperate piece of paper — There were therefore but two witnesses to the will

2d A <u>will</u> to which there were no witnesses ~~to the will~~ a Codicil ~~thereunto annexed~~ wrote, executed by <u>three</u> witnesses — The codicil recognized the will and yet this was held not to be a good devise, upon the ground that the will was not present at the time of executing the codicil If the will had been

P. Ch. 184.
2 Atk. 177-

Devises.

prevent ~~Mr Lowe~~ Mr Lowe supposes that the execution would be good –

3rd A Will and Codicil on the same piece of paper, and a sufficient number of witnesses to the latter – Here the will must necessarily have been present at the execution of the codicil, and therefore was held to be good –

4th A will containing 8 or 9 separate sheets signed at the bottom by the testator – if the last sheet is subscribed by three witnesses it will recognize the whole as one will and of course make it valid –

There has been a distinction drawn between a "will" and a "codicil" but Mr Rowe confesses he cannot see it –

5th An illiterate man made a will and being ignorant of the legal requisite omitted to have a competent number of witnesses – Afterwards finding it out he drew up an other writing altogether consistent with the former to which he had the legal number of witnesses – All constituted one will and was good – That all the witness must be present – see – Pre Ch. 184 –

N. A fourth requisit is that it must be attested by 3 or ~~four~~ more credible witnesses – & in the presence of the testator –

For what purpose is the word credible added? some contend that any credible persons would be admitted to prove

a will, and therefore devisees themselves if credible would be admitted. Others say they must be "competent" witnesses. But upon the whole we may conclude that the word credible was in meaning nothing more than legal witnesses. In fact Mr Reeve supposes it to be superfluous.

Can a Devisee so purge himself of interest by the matter ex post facto, as to be suffered to prove a will which made him devisee? In answering this an other ~~this~~ question involves itself, which is whether witnesses to a will must be competent or disinterested at the time of subscribing the will? The fact is that if at the time of proving the will they have no bias on their minds they will be competent witnesses notwithstanding their interest at the time of subscribing. This is Mr Reeve's opinion.

A witness being a devisee has only a contingent interest i.e. it is contingent at the time of attesting, for the will may afterwards be ~~altered~~ revoked. and is not an heir at law whose father prosecutes an action of ejectment more interested than a devisee? and yet he can be a witness in such a case. Mr Reeve therefore favors the idea of the admissibility of a devisee as a witness.

In the spiritual courts it was always practiced that a legatee on releasing his interest might become a witness to a will; for to wills strictly speaking no witnesses are necessary.

according to
Mr Reeder
this was
decided too
in my time
1 B & Ad. 374

Burr. 414.
Ruxsey vs
Doe

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It was contended by the advocates for excluding the devises that a new system of evidence was intended to be introduced by the stat. From this hypothesis Mr Reeve entirely dissents, for stat. do not usually affect the pleadings or evidence collaterally - and besides the adoption of this idea would lead to great difficulties and absurdities - Suppose that the devisee at the time of subscribing did not know of the devise to himself at the time of attesting, he could have no bias which could on any principle exclude him.

The decision in Strange was a very alarming one and brought on a statute (25 Geo. II c.5) by which it was enacted that all legacies given to witnesses should be void - From this stat. no inference can be derived which will militate against the doctrine contended for by Mr Reeve, for the stat. might as well be made in affirmance of the Com. Law as in alteration of it - In Eng. 6 judges have decided in the affirmative ~~of the Com. Law~~ and 6 in the negative so that this is now a great question -

In Con this question has been twice decided in the affirmative in the Superior court, and their last ~~court of error~~ determination has been reversed by the supreme court of error - So also here this is questio indeterminata

V. Tho' not mentioned in the stat. ~~the~~ it is necessary that the devise be published - This was held necessary under

8 Vinr. ab.
125.

3 Atk. 156

3 Mod. 269.
1 Bl. R. 407.
420. 454.
3 Burr. 1773.

1 Roll 615.
Cro. J. 115.
4 Q. B. 7.

Devises.

the stat. of Hen. 8. and was introduced from analogy to a deed which must be delivered. Indeed a devise may be delivered as as a deed.

Under the stat. of Car. 2 it is not strictly required that a devise be published, But Mr Reeve thinks the subscription and attestation required by the stat. of Car. to be ~~equivitant~~ equivalent to a publication.

VI. It is required that the entire will be present at the time of attestation. Whether it was present or not is a question of fact to be left to the determination of the jury.

As has been hinted the inherentcy of every thing human often renders it necessary that the great fact of the devisor's signing the Will in the presence of the subscribing witnesses, be proved by slight evidence.

Of the Revocation of Wills.

Revocations are either express or implied. In Eng. there is a stat. respecting the solemnities requisit to an express revocation which has been adopted by some of the states tho' not by all. It is not adopted in Con.

The greater part of Revocations being implied are not operated upon by the stat.

Before the stat. an express revocation, tho' ~~by parol~~ if made

1 Bid. 93.

3 Wil. 511.
1 Show. 507.
3 Mod. 203.
3 W. 497.
Cowp. 37.
7 Bro. P.C.
344

1 Ves 178.
1806

Devises.

animo revocandi would annul a will –

No expressions of an intention to revoke are a revocation.

An implied revocation may arise from some collateral act of the testator which absolutely implies it, or by some act of his, furnishing ground to presume a change of intention, or from the mere operation of law –

A second will inconsistent with a former one is an implied revocation, and if it be inconsistent with the former one in any material point it entirely revokes the former – On principle however it ought to revoke it pro tanto only i.e. to the extent of the inconsistency –

A codicil may be a revocation of a former will but not unless there be an express clause which operates as a revocation and no farther than such clause extends for the codicil recognises the former will –

Where a second will is made under a false impression as to a matter of fact, without which false impression it would not have been made, it is no revocation of a former will, however inconsistent with it, it may be –

But when such will is made as under a false impression as to the law it is a revocation – there the intention to revoke, but in this case this rule bends to reasons of policy, for a contrary mode of proceedure would produce much confusion

4 Burr.
2512 —

Cowp 49.53.

Doug. 30.
Brodie vs
Cubitt 34
Sprague vs
Stone —
4 Burr. 1471.
2 Str. 1182. Sel. Ca.
441. 1 Pow.
204. 5 T. Rep.
49 —

Devises.

Suppose a will impliedly revoked by a subsequent inconsistent one, and that such second one is afterwards expressly revoked is the first will ~~revoked~~ revived? Resort to the intention of the testator of ~~the testator~~ - By this Mr Roscoe thinks it will generally be found the safer way to revive the first will and so it is decided.

But if the first will be cancelled and destroyed, it is not revived by the destruction of the second.

Suppose the second will expressly revokes the first, & is afterwards destroyed still the first is not ~~revoked~~ revived. Mr R. thinks this distinction not founded on principle.

In the case cited from Cowper both the first and second wills were cancelled but there was found in the testator's house a duplicate of the first uncancelled, but it was holden to be no revival of the first.

Such a great alteration as takes place in the circumstances of the Devisor by marriage and the birth of a child is an implied revocation of a devise previously made as well as well as of a will.

So also marriage and the birth of a posthumous child work a revocation - These cases proceed upon the ground of an implied change of intention in the devisor arising from the alteration of his circumstances. It has been said indeed that unless the devise works a total dis-

(a) This rule should have expressed in Con. but in Eng. it has been implicitly repealed by a state of Express revoking will as will be seen further on in the lectures.

2 Bl. 502.

4 Co. 61.
1 Vern. 105.

Moor 599.
Popph. 108
1 Bl. Ro. 349.
1 Roll 615.
1 Ver. 176. note.
Snowdon 82.
9 Mod. 190.
10 Mo. 237.
3 Atk. 72.

-ishment of the issue, the circumstances above mentioned do not amount to a revocation, but Mr. Jo. thinks this by no means correct, but that the intention of the testator is to govern in all ~~instances~~ exclusively.

It was formerly contended that subsequent insanity of the devisor, which rendered him incapable of altering his will, when he would probably have done it, had he possessed the power amounted to a revocation. But it was always ~~decide~~ determined otherwise.

An other species of implied revocation arises from an <u>intended revocation</u>; when the instrument designed to revoke the first will, is deficient in some essential requisite to its validity as a will, yet it shall operate as a revocation. (a) This is also on the ground of the intention of the devisor. Mr Reeve observes that the principle seems hardly to warrant the decisions; for certainly in such cases the land cannot pass to the devisee, in the second devise because it is insufficient and inoperative as a devise. but it will go to the heir at law who may be ~~by~~ a very different person from him who is the object of the devisor's bounty, and thus his intention will be as effectually frustrated as if the first will had been permitted to stand. But the law is so settled and so we must be bound.

1 Roll 616.
8 Co. rep. 90.

1 Roll 616.
1 Show 92.

3 Lev. 104.
3 Plt. Mod
wood. vs.
Tower.

Devises.

The rule last mentioned applies to all devises where they are made to devisees incapable of taking, as a corporation &c.

Hitherto we have treated of revocations implied by the intention of the testator. We will now treat of Revocations implied from an alteration of the estate and which therefore are an exception to the general rule that the intention of the testator is to govern.

Cases 1st. Where a testator devises an estate, then sells it, and afterwards purchases it. This will be such an alteration as will revoke the devise.

2d. A devises to B. in fee. Afterwards marries and wishes to make some provision to his wife, makes a trust estate for his own life remainder ~~to~~ in trust for the life of his wife. Here the intention was evidently not to defeat the devisee's estate in fee, and yet this was held a revocation upon the ground of an alteration. In this Wm. B. sees no reason.

3d. But the courts have gone even farther. A being possessed of an estate in tail devises &c, and to give validity to the devise suffers a recovery, this was esteemed & held to be a revocation upon the same ground.

4th. But to so ridiculous a length have the courts carried this principle, that an intention to alter has been

3 Atk. 808.

Tom. 240.

Vern. 329.
1 Salk. 168.
3 Atk. 740.
Bot. 2 Ed.
Ry. 96.

Devises.

held to be a revocation. ~~upon the same ground~~ As where A. gifts to B. in fee devisee to B. afterwards thinking the estate was in tail, suffered a recovery to bock the entailment and therefore to give validity to the devise. This was held a revocation on the ground of an intention to alter. No doubt the precedent establishing this principle, was made by an interested ~~jududge~~ judge at first and other subsequent judges have followed. ~~like a good judge~~. This want of adherance to the intention of the devisor has destroyed the symmetry of the law upon this subject.

It is an established ~~th~~ rule that where there is an equitable estate chancery will not consider such alterations a revocation but in legal estates chancery will be governed by legal rules. Or in other words whenever legal estates are made equitable over an alteration will not be a revocation, but ~~th~~ when equitable estates ~~rules~~ are made legal over, legal rules govern. Partitions of estates after devise will not amount to revocations.

Again the alteration brought about by a mortgage is no revocation i.e. it is a revocation *pro tanto* only, for the devisee may at any time pay the mortgage money and take the estate.

But there is a distinction between the mortgage

8 Univ. ab.

P. Ch. 514.

2 Atk. 292.
4 P. Ch. 92.

of a lease for years or for a term for years, and the mortgage of a fee — As where A. owning a lease for forty years devises it to B. Afterwards A. mortgages to C. a part of the term say 20 years, in this case it will be a revocation pro tanto only at law, in equity the devisee may redeem it at any time.

A. devises a farm of land to B. and afterwards mortgages to B. B. being ignorant of the will. This will be a revocation upon the ground of an intention to alter.

In all ~~cases~~ estates in which Cha. has cognizance alterations will only revoke pro tanto. For such alterations, as in mortgages &c are almost uniformly made for the purpose of paying debts or answering some other specific purpose, which when done the devisor's intention is answered and the devisee will take the estate — or in the first instance the devisee may be said to take it cum onere.

Thus far as to alterations & now for other causes of Revocations, which indeed may be called alterations of the estate.

The act of a stranger may cause a revocation and to digest the following it is necessary to remember that no man can devise an estate of which he is not seised at his death.

A. devises an estate to B. & disseises A. and holds him

1 Roll 610.

1 Roll 37B.

2 Vern. 441.

1 Roll. 616.
Cro. B. 2B.

Devises.

out at the time of his death, B. the devisee cannot take — But

Again when a devisee makes use of any fraud coin &c. to alter the disposition it will not be a revocation. As where A devises a part of his real and part of his personal estate to B. and also a part of each to C. both being his children, now C. not taking the disposition dispeases his father and holds him out till after his death — the court in this case would interfere and not suffer this trick to vitiate the will —

So also where a stranger or other person tears up or destroys a will, now if the contents of the will can be substantiated in any way it will not be a revocation —

One thing farther as to the alteration of an estate — Notwithstanding what has been said, yet if there has been a will made, and a subsequent conveyance operating merely as an abridgment, it will be a revocation *pro tanto* —

A. devises an estate to B. afterwards leases it to C. for the life of C. now this is a revocation *pro tanto* i.e. for the life of C. Thus much for *implied revocations*.

In the same stat. *29 Car. 2* in which there is a *devising clause* (which has been considered) there is also inserted a clause of

Express Revoking Wills.

Which will now be considered — This will by no means interfere with *implied revocations* — It has relation to such only

A

Devises.

or are themselves expressly mentioned only.

Parol proof may be admitted to prove the facts out of which revocations may be implied, but in express revocations there are three specific clases pointing out what must be done in order to a revocation – 1st In the first place, no devise shall be revoked unless by some other will or codicil in writing declaring the same (that is containing a clause of revocation) or,

2d It must be revoked by tearing, burning, cancelling, ~~or obliterating the same~~ some other writing of the devisor, signed by himself in the presence of 2 or more witnesses – or

3d It may be revoked by ~~some other writing of the devisor signed~~ tearing, burning, cancelling or obliterating the same –

If a second will is made without a clause of revocation, it will imply one; but this revoking part of the stat. was made to prevent parol revocations by the testator – Before the enacting of this part of the stat. any parol declaration ~~signiff~~ significant of the testator's intention, or any instrument of writing whatever was a revocation. This was at Com. Law.

The first and second requisite are only restrictive and do not introduce any new law – They only exclude that any writing or any parol declarations being revocations except such writings is signed with the requisite –

3 Mod. 54.
1 Show. 89.
Carth. 79.
2 Atk. 142.
1 P. Wm. 543.

Devises.

I. But as to revocations by will or codicil and

II. As to revocations by some other writing signed by the testator in the presence of three or more witnesses, which will both be considered together—

When you judge of a revocation by "will (&c) a second will the first question to be determined is, whether this 2d will be a good one— Whether it is duly made and is a good disposing will, having in it a clause of revocation, as well as all the stat. requisites, for if it is not, it will by no means be a revocation— If it is not a good disposing will but will come under the 2d class of "a writing by the testator in the presence of witnesses" it will not be a <u>revocation</u>— The rule is this that if a man attempts to dispose of property and at the same time and by the same instrument attempts to revoke a former will, it will not be a revocation, unless this 2d is a good disposing will— But if the <u>object</u> or <u>intention</u> of the testator is not to make a disposing will, the instrument being signed by three witnesses will be sufficient to revoke the former will—

<u>Cases</u>— A. devises to B. by a good title, then makes a disposition of the same property to C— Now the jury in their special verdict found that there was a first, and also that there was a second will, containing a clause of

I.

II.

Comp. 52.

revocation, but because the witnesses to the second will, did not subscribe in the presence of the testator, the will was not good and therefore not a revocation.

You have already infered, that a will may always be revoked by a will or codicil duly made and executed according to the devising clause of this stat., and that you may also revoke a devise by an instrument, which for distinction sake is called a revoking will, which need not have the requisite of a devising will.

In Con. there is no revoking clause adopted; therefore the devisor may revoke by any writing signed by himself, and significant of an intention to revoke — Mr R. does not know but there may be a parol revocation in Con.

III. A devise may be revoked by the act of the devisor in burning, tearing, cancelling or obliterating such devise. These acts or any one of them to burning would revoke a devise at Com. Law before this stat, but this does not render a consideration of this part of the subject the less necessary.

But let it be remarked, that these acts therefore do not constitute a revocation. To do this there must be animus revocandi — The intention must be referred to; for if any one of these acts be done by accident

1 P.W. 246
2 J. Bl. 2/3,
under title
Devises —

it will by no means be a revocation.

But in general if a man attempts to destroy the devise and it is manifest that he aims at ~~the destruction~~ i.e. destruction it will be a revocation.

To prove the "animo" i.e. the intention which influenced the testator in meddling with the will, parol proof must be admitted as the best evidence the nature of the case admits of.

There are cases where a man commences the destruction of his will, and for some cause stops, and yet these ~~wills~~ wills will ~~not~~ not be void, but will stand. As where a man having a will and wishing to revoke it, makes a second will but before the second is finished he commences tearing up the old one, thinking the new one ~~possibly executed~~ properly executed, but finding it not to be so he tears the old one up carefully and puts it away until the new one be ~~properly~~ properly authenticated; in the interim however he ~~sick~~ sickens and dies. now the new one never having been witnessed it has been determined that the old one stand and this (I presume) upon the ground of intention of the testator.

No matter in how slight a manner the testator burns, tears, cancels, or obliterates his will, yet if it be done

Sutton vs.
Sutton —
Comp. 812.

animo destruendi it will be a revocation.

If however the will is merely rumpled and not torn at all or not burnt or not at all obliterated or cancelled, it will probably not be a revocation express within the stat. altho' it might have been rumpled "animo destruendi"

One doctrine farther. It has been held that when a testator has made some obliteration, so as not materially to effect his first design in disposing, it was no revocation. As in a case when the devisor altered "400" to "450." the word "daughter" to "daughters" &c. and this without materially affecting his first disposition.

Of the Republication of Devises.

A will or devise may be impliedly (and the Rome seem to think expressly) revoked, and a republication of the same will, will revive it.

It is a rule which must not be lost sight of that real property purchased after the making of a will, will not pass by the same will, but personal property purchased subsequently will pass by it.

Real property will not pass because it is capable of being clearly ascertained defined and identified, and

Ino. 2. 492.
Com. Dig. 981.
3 P.W. 229.
1 Ves. 432.
1 P.W. 275.
5 Co. rep. 68.

if not mentioned in the first will, is supposed not to be intended, but personal property is variant, unsettled, and often very often ~~much~~ uncertain apertained therefore it is supposed to be contem=plated by the testator —

Leave hold estates subsequently purchased will not pass, altho' accounted personal property, and this is because they partake of the identity and certainty of real property.

The republication of a will causes land purchased subsequently to the making of the will to pass — ie all the land purchased previously to the republication — A will republished operates from the time of the republication — It speaks the same language as if it was actually made at that time —

But please to observe, that a republication will not pass what was not mentioned in or intended in the first in=stance ~~B~~ "Ex gratia" where the words in the will are "I devise de all my lands lying in Litchfield" — This will pass all lands lying in Litchfield, and purchased subsequently to the ma=king the devise and previously to its republication — but land subsequently purchased and lying in ~~Blainington~~ Har=winton, and not mentioned will not pass —

Mr Reeve having pointed out the effect and operation of a republication will now consider what is necessary ~~what~~

to constitute one—

Before the stat. of Fra. & Per. any words spoken "animo ~~revocandi~~ republicandi" with reference to the will, would have been a good republication; but since the Stat. 29 Car. 2 no express parol republication will be good— Yet there is no clause in this stat. which says that an express declaration will not be a republication. There is no clause requiring a written instrument to make a republication as there is in case of REVOCATIONS— The determinations which require a writing signed by the testator, proceed upon the ground that the re-publication of a will is making a new one but Mr Reeve does not see why this reasoning would not as well operate before the stat. as since—

A republication to be good must be in writing and execu-ted according to the stat. of frauds and perjuries, because were this not the case parol proof must necessarily ~~be~~ have been let in to prove a republication i.e. a disposition by the ~~testator~~ testator which was the mischief the stat. intended to remedy—

If you are about to make an express ~~revocation~~ republication, it is not ~~necessarily~~ necessary that you write the same will over a-gain, and altho' it need not be subscribed by the witnesses, yet the testator must sign and acknowledge it in their

2 Atk. 589.
1 Ver. 440.
9 Mod. 78.

2 Vern. 498.

3 Atk. 180.

Cro. El. 498.
1 P. W. 168.
1 Bur. 514.

Com. rep.
3 Atk. 1 Ver. 427.

presence.

A parol republication will however pass personal property purchased subsequently to the making of the will and previous to the publication.

A codicil to a will made and executed according to the stat; i.e. the devising clause will republish the will, to which it is a codicil. But ~~there~~ it was a doubt whether there should be a clause in the codicil, shewing the testator's intention to republish.

It has been "Questio vexata" whether a codicil to a will executed according to the stat. without a clause of republication will republish that will. It is the opinion of Ld Hardwick that a codicil to a will so made did republish it, upon the ground that whoever makes a codicil must contemplate the will, for its very quality is to alter or subtract ~~a subtract~~ from a will.

Another "questio vexata" has arisen, whether it will make any difference whether a codicil was one of personal or real property. It has been held that if the codicil is annexed to the will it will be a republication if its subject matter be personal property only.

But what difference does it make whether the codicil be annexed or not to the will or not.

Com. rep.
381. 1 Ves.
437. Comp.
158—

1 P. W. 244.

Pr. Ch. 270.
2 Vern. 597.

Ibid. 162.

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Altho' these 1 Vern 621. & 1 Ves. 489, are contra, yet Mr Rowe says that the current of authorities make the codicil a good republication of a will disposing of real property, even tho' it be not annexed to the will.

The doctrine relative to ~~a will~~ making a will speaks from the time of its republication is certainly sound and obtained in all the cases. But let it be remarked, that if a codicil republishes a will, yet it does not give it new properties it will only give it operation as the same will from that time.

Suppose a will and a codicil are both made the same day, or at the same time, can the executing or signing the codicil be applied to, or validate the will? It may be altho' there are two authorities, which seem to be contra — However Mr Rowe supposes they were not intended to contradict the principle, 2 Ath. 599. 3 Ath. 176.

One thing further. A will made by a minor will be good if republished if by him after he comes of age —

Of the admission of Parol evidence to explain both Latent and Patent ambiguities arising from Devises —

With regard to the admission of parol evidence to explain

5 Co. 68.
2 Vern. 98.
2 P.W. 316.
1 Vez. 189.
2 Atk. 216.
3 T.R. Row.
94

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be both wills and deeds, there is not so much real difference as may at first be conceived: that is, nearly the same evidence may be admitted as to each.

It may be laid down as a general, if not an universal rule, that no parol declarations of a testator of what he intended, are admissible to explain, enlarge, diminish or rescind his will or to give it any import, or make it any way different from the will itself.

Notwithstanding this rule there are a very many cases where the declarations of the testator previous and subsequent to making the will, have been suffered to be proved. But these were declarations not made with specific reference to the will; they have been merely the testator's story indicative of the manner in which he intended to dispose or had disposed.

There is no testimony so vague, uncertain, and precarious as that which refers to what a man has said. Men understand the same language very differently. Indeed what they apprehend at one time, they may conceive of, and apprehend quite differently a few years after. Hence, the propriety of the general rule above, which goes to cut of testimony of the declarations of a man in his life time.

It will probably be asked what then may be proved by parol concerning wills or deeds? The answer is that you

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may prove matter of fact by parol from which conclusive and satisfactory inferences may be drawn. As in case of Mortgages where a man sells land and keeps the deed himself or remains in possession — now parol proof of these facts is satisfactory evidence very often that it was not an absolute sale — These facts are such as may be proved without danger of misrepresenting or misunderstanding, for let it be remarked that this stat. (of Fr. & Pen) was enacted not only to prevent frauds and perjuries, but the innumerable mistakes which were introduced previous to its enaction from the admission of parol testimony —

It is to be observed that no averment will be suffered to be made unless it stands well with the ~~deed~~ will i.e. in ~~deed~~ does not in any degree contradict the will — Any fact which stands well with the will; and from which the intention of the testator can be collected may be ~~averred~~ averred —

There are sometimes doubts which arise concerning the will, and which may be explained by facts de hors the will, and these are called latent ambiguities — Parol proof will here be admitted to explain the testator's meaning or intention — I mean parol proof of these extraneous facts.

As where a man devises property to his son Thomas and he has two sons of that name. Also devise of black

8 Co. rep. 1450.
6. 5 Co. rep. 68.
2 P. W. 189

2 Vern. 624.

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acre and the devisor had two farms called black acre. In this case parol testimony will be admitted to explain the testator's intention.

Also where a man made a devise to his children naming them, but left the youngest and favorite child unprovided for Parol evidence was admitted of this fact.

In all these cases of latent ambiguities, or ambiguities dehors the will, parol proof of some extraneous fact may be admitted to explain the testator's intention, but no evidence of any of his declarations.

But if this ambiguity appears upon the ~~will~~ face of the will, upon reading it is not dehors the will and is therefore an ambiguity ~~appears upon the face of the will upon reading dehors the will~~ Ambiguity patent. Now if the ambiguity is ~~patent~~ so great that it is impossible to form any opinion of what is intended and no sense can be made of it, no parol proof can be admitted and the will must therefore fall; but if the testator ~~intention~~ intention can possibly be collected by taking the whole together the will is good. As to the first, where lands were devised to one of P.'s children, and no one could possibly tell which was intended this destroyed the will. for no parol proof could be admitted to explain the intention intire.

2 Bulr. 180.

1 Salk. 4.
6 Mod. 199.

2 P.W. 126.

2 Ver. 216.

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Also devise to A. to the use of haredum suorum &c. The Latin was here so corrupt as to give no data from which to form any opinion of who was intended and of course the will was naught.

But devise to A.B. there being two of that name but living in different places - here parol proof was admitted to the fact that he knew nothing of one ~~an~~ and of course the other was intended.

Where the ambiguity arises from the sentences of a will, a construction must be given to them if possible, therefore no parol testimony can be admitted to explain. As a devise to the right heir on my mother's side. How to know what heir, a construction must be given.

Ambiguities dehors the will - It has been observed and is necessary to be remembered, that no averment can be admitted unless it stands well with the will.

Devise of £500 to the 4 children of cousin D.B. Now D.B. had 6 children; shall parol evidence be admitted to explain which four was intended? yes: for it will stand well with the will - this is one of the cases where parol testimony was admitted as to what the devisor had said (which was a story of what she had done) and having no particular reference to the will in question -

Devise of £500 to the children of D.B. Here testimony will not be admitted to prove that 4 children were intended, because

1 P. W. 674.

2 Atk. 240.

1 Atk. 410.

8 Viner 194.

2 Ves. 218.

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it would not stand well with the will.

Legacy of £500 to a charity school in Kent there were two charity schools in Kent — Here parol proof of the devisor's particular love for and attachment to me, was admitted, and deemed satisfactory.

Cases of false discription or to be more correct ca=ses of wrong manner but of proper discription.

There are cases in which parol evidence is admitted to explain wills but would not be admitted to deeds — If the devisee is named by a wrong name, yet if it was evident from any discription given that he was intended, he may claim.

As where a man had a niece and called her by a nick name — Devise to her by their nick name, but a discription of her, for the devisor had other nieces. Here the court let in evidence to prove the circumstances from which it was infered that she was ment —

So also where there were two sons devised to, by nick names

So also where the devisor forgot the name of the devisee, but devised to him, describing him as being in the service of the duke of Savoy —

No proof like this would be admitted in cases of deeds the rule only extends to admit evidence that such an one

2 Atk. 240

2 Ver. 210

4 b. rep.
Myab

Devises.

was described.

Where there is a devise giving £500 to Mr leaving the name blank it will be void, for no evidence will be suffered to explain who was intended.

Ambiguities patent arising from Equivocal words

Parol proof is sometimes admitted to explain equivocal words, but not equivocal sentences in a will i.e. parol proof of facts from which it may be inferred who was meant.

As where two women were contemplated and mentioned in a devise, and at last in a sweeping clause it is mentioned "I give and bequeath to all to her" how parol proof could be admitted to ascertain who was meant by "her".

So in case of a devise "Seniori puero" Parol proof was admitted to show whether son or daughter was intended as devisee.

Again the circumstances of a man's family may introduce an Ambiguity; as where there is a devise to A. and his children. Now the word children in its legal sense or signification has a different meaning according to the state of the person to whom lands are thus devised. If lands are devised to a man and his children, it will go to himself & them in equal shares as joint tenants ~~in common~~, and in this case the word "children" will be a word of purchase.

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But if he has none the word children in the same light as if the devise had been to him and the heirs of his bodyie. it would be an estate tail, and in their case the word "children" would have been a word of purchase limitation. — Now parol testimony as to the fact of his having or not having children — is admissible

The following case depended upon the words "I devise to A. the whole of my estate" It is thought proper to observe that previous to the stat. of wills nothing but a life estate could pass by the word "estate" in a deed, there must have been the word "heirs" to make it a fee simple or a fee tail — But after the practice of making wills was introduced the intention of the testator began to be attended to — If it was clear that a larger estate than one for life was intended to be given, it would be construed as an estate absolute — But where a man devises all his estate to A. for the payment of debts, and it so happens that his personal estate will not pay all, does his ~~red~~ real estate pass? This was long a question but it is now settled that parol evidence may be laid hold of to prove the circumstances by which it may be collected what the testator intended — In this case, that the personal property would by no means satisfy the demands, and

1 T. R.

Pow. Dev.
509.

1 Salk. 234.
2 Ld. Ry.
831. 1 Bro.
Rea. 188.

that therefore the devisor must have intended to pass his ~~real~~ real estate.

It is now also clearly settled that a devise of all mis estate will ex vi termini pass an estate in fee simple, altho' it is not the case ~~indeed~~ in deeds.

In all these cases of "equivocal terms" parol proof will be admitted of circumstances which may make clear the intention of the testator.

But this doctrine of parol testimony being admitted is carried still farther — "For words not equivocal nor attended with any apparent ambiguity may, when applied to the testators property throw light upon these words, by averments respecting the state of that property, and by this means receive such a construction as will suit the state of that property tho' contrary to what they technically import"

Case — "I give to W.B. the house called the ~~Bell~~ Bell tavern" So far then there can be no doubt, for in Eng. when a thing is named per se it only passes a life estate, tho' in Con. it passes a fee simple — The word, ~~estate~~ has a ~~in other words~~ not equivocal — It has a certain definite meaning — The facts however were that J.B. was already tenant in tail of the Bell tavern, and the devisor himself had only the reversion, after the estate tail was spent — Upon the death of the tenant in

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tail, without issue of his body, the tavern was claimed by the heir of the devisor — Now the question was did the reversion pass by this devise of the Bell tavern? Parol proof was let in to prove the circumstances, which when taken altogether were conclusive proof that the devisor intended to pass the remainder, notwithstanding that the words were unequivocal — It was determined ~~to give that to give~~ that he meant to give a different estate from what the words ~~took~~ technically import. An estate in fee simple. Judge Holt being contra, a writ of error was taken but judgment was affirmed —

Another case turning upon the same ground — A woman devised £100 stock in long annuities to B. 100£ stock in long Ann. to L. 100£ stock in long annuities to D. and the rest and residue of her estate to the Finnerys — But it turned out that the woman has had in all but 120£ stock in long annuities per annum — She must there have intended to get 500£ by an absolute sale of the annuities which could be done and each devisee w.d then have his bequest, and there would have been a remainder for the Finnerys — Here parol evidence was admitted to shew the state of the property notwithstanding the ~~property made use of~~ terms made use of were unequivocal.

This was affirmed in the House of Lords —

The general rule which ought to be here laid down

Talb. ca. 240.
2 Story. 261.
8 Viner ab.
195.

P. Doc. 522.3.

is "that no parol testimony shall be admitted unless it stands well with the will", and neither will any evidence be admitted to contradict the legal operation of words in the will –

The case reported in 1 Vez. before referred to of a devise to cousin E.B. and her 4 children – The having 6 children parol proof was admitted to shew what 4 children the testator meant – But in the same will there was a gift to the children; an attempt was made to introduce parol proof to shew that by this the same ~~parols~~ 4 children were intended, but not admitted for it did not stand well with the will –

It has been said where a devisor appoints his ~~executor~~ debtor Exr. the debt will thereby be released, but A. appointed B. & C. his Exrs., one to wit B owed him £3000 ~~and C. Ho parol proof could be admitted to shew that the testator intended to release it~~ After his debts were paid and legacies were satisfied he gave the residuum to B. and C. his Exrs. Here parol proof was admitted to shew that this debt was not released but was afterwards to pay the residuary legatees that is B. owing the 3000£ and C. No parol proof could be admitted to shew that the testator intended to release it – It would not have stood well with the will –

~~It has been said~~ Where there is a devise of lands directing them to be sold for the payment of debts, it is construed according to

2 Bac. ab.
426

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the English rule, that they are not to be sold for this purpose, until the personal property is first applied, and fails. As where a man made a will directing his lands to be sold to pay his debts when in fact he was possessed of a personal estate at a large amount. In this case it was contended by the heir that the real property could not be sold until the personal was first applied, But on the other hand it was contended that this would not stand well with the will. It would contradict the legal operation of the writing which can never be done.

Again. It has already been stated that whenever there is a will giving no legacy to the Exr, yet if there is any property remaining after the payment of debts and legacies the residuum in Eng. will go to the Exr. It is however different here where the Exr is paid for his trouble. Parol testimony was here not admissible to show that the testator intended that the residuum should not go to the Exr.

Impress this rule well on your memory that whatever the legal construction is, no parol testimony can be introduced to contradict it.

A further branch of this doctrine is where parol evidence may (and some times the declaration of the testator himself) be admitted for the purpose of

Rebutting an Equity.

or

Pov. 524.

Pov. A. 525.
2 Dem. 253.

Devises.

Ousting an Implication of Law.

As Powell says it down "parol declarations even of a testator are likewise received in all cases to rebut the ~~construction declara-~~ ~~tion~~ constructive declarations of a trust, put on words contrary to the legal sense of them be which is rebutting an equity; for in such cases the estate is in the devisee and the averment is in sup-port of the letter of the will."

Judge Ros. definition may be a little more perspicuous — ~~the~~ the observer that Law and Cha. have given different constructions to the same will i.e. the words in the same will; and where there is an equitable construction and a legal one parol proof may be admitted to rebut an equitable one and thereby make way for, and let in the legal one — An example will illus-trate this definition — As where A. devises lands Viz. Blackacre to B. whom he appointed his Exr. for the payment of debts and legacies — Now B. having paid all the debts and legacies there was "a residuum" the legal construction is that the Exr. should take this residuum, but the equitable one is that it is a rebutting trust in the hands of the Exr. for the heir at law. Now the ques-tion is can parol testimony be introduced to rebut this equity that is, to shew that it was the testator's intention that this residuum should go to the Exr.? It certainly can, for the ex-

Poro. 528.
2 Vern. 677.

Pow 425.
2 Vern 252.

Talbica 79.

Devises.

=tate is vested in the devisee.

Again. A makes a will and appoints B. his Exr. & directing him to give a legacy £ to C. & then one to himself. Now if there had been no legacy to the Exr. the legal construction was clearly that the Exr. should have taken the residuum, and the equitable one that it was in trust for the heir. But even in this case where the legacy independent given them him, yet parol proof was admitted to rebut the equity and oust the implication of law i.e. to shew that it was the testator's intention that the Exr. should have the residuum or surplus.

It is a rule of equity that whenever a man mortgages an estate and dies the heir of the mortgagor has a right to redeem. he may call upon the Exr. to furnish him with money out of the personal property. But notwithstanding this rule where a man owed money by mortgage, and on his death made his wife Executrix now parol proof was admitted to shew that it was the devisor's intention that his executrix should have his personal & estate exempt from debts; and in consequence of this the heir could not have aid of the personal estate to pay off the debts mortgage ~~estate~~ debts; notwithstanding that by the rules of court the same was liable to be so applied.

But there are cases which are ~~decisiv~~ decided upon grounds not perfectly understood by Mr Rowe and there

22. Ny.
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Pow. 526.

Devises.

cases are where parol proof is admitted to explain the testators intention in

Repeated Legacies.

Mr K. conceives it to be settled that where there are two or more legacies given in one instrument "in totidem verbis et ejusdem generis" to the same person, they will not be accumulative; but if in a different instrument ~~from the will there are~~ two legacies are given or more to the same person in the same words, and of the same kind as in a codicil &c they will be distinct and seperate legacies i.e. they will be accumulative - this being the case Mr K. asks where is the necessity of parol proof being introduced to explain the testators intention in repeated legacies?

It is also settled that where there is a devise of ex gra £250 to Mr & Ks. and afterwards at a future day the devisor made a note giving the same sum to ~~on~~ Mr. & Ks. This note was deemed a codicil & therefore was an addition to the will £250 more - Parol proof was there admitted shewing that the testator had declared that he would make up £500 to Mr. & Ks. Vide cases in Pow. on Dev. 526.

It should be particularly mentioned that in all the before mentioned cases parol testimony is admitted on the ground of standing well with the will -

Pow. D. 529.

2 Vez. 323.

Pow. 530.

Devises.

Upon the same principle of the evidence not being contradic=tory to the will it has been held that parol proof may be brought to show that a devise is meant as a performance of a preceding a=greement; for in such case the evidence is not made use of to con=strue the will, but to explain whether the one thing is in sat=isfaction of the other.

As where a man before marriage covenants with his in=tended wife to settle an estate on her — but neglects until his dying and then gives her in his devise what he had covenanted to settle upon her — Now the question is can parol proof be ad=mitted to show that the testator gave it in satisfaction of a duty? Yes, for ~~they~~ this will in no way contradict or impeach the devise.

Parol evidence may be admitted in all cases to counteract fraud; because to decide otherwise would be to make the rule instrumental in encouraging <u>that</u> which it is its ob=ject to prevent.

Of admitting parol evidence to explain devises

Mr. Reeve has taken the pains to write a synopsis of the foregoing lecture upon permitting parol testimony to ~~be given~~ in explaine wills, for the use of his students of which the following is a copy "ver=batim et literatim". He has given the ~~general~~ different cases of

of general rules –

I. Parol averments of the Testator's declarations of his intention at the time of making the will are not admissible, for if those declarations are in conformity to the will they are useless; and it is against the principles of the Com. Law and opposed to the stat. of frauds to admit them to explain, enlarge, diminish, or rescind the language of the will, or give the words therein used a meaning different from what they obviously import –

II. When there appears an <u>ambiguity</u> on the face of the will not arising from the use of equivocal words but from the construction of sentences contained in the will, no parol proof of any kind is admissible to explain what the testator intended –

III. If an ambiguity arises dehors the will as in the case of two devisees of the same name, or of two farms known by the same name and one only is devised, in this case parol proof of the testator's intention not arising from his declarations but to be inferred from the proof of certain facts, is admissible.

IV. When there is no ambiguity respecting the person who is intended as devisee, he being sufficiently described but called by a wrong name, averment may be made of the true name –

V. When an equivocal word is used relating to a person an

averment may be made who was intended.

VI. When a word is used, that is equivocal, because under some circumstances it is a word of purchase and other circumstances is a word of limitation, a parol averment of the circumstances family may be introduced.

VII. When an equivocal word is used as to the quantity of the property devised and thereby it becomes uncertain from the words of the will what quantity of property is devised, parol averment of the circumstances and state of property of the testator may be made to enable us thereby to discover what quantity of property the testator meant to devise.

VIII. Tho' the words are not equivocal, yet if their technical meaning will render the devise ridiculous and the conduct of the devisor unreasonable such meaning not withstanding with the state of property of the devisor, then this state of property may be averred, for the purpose of producing such a conclusion of the words of the will, as will comport with the state of property tho' contrary to their technical meaning.

IX. Parol evidence and even parol declarations of a testator are admissible to rebut an equity. It frequently happens that the construction of the words of a will in a court of Law is different from the equitable construction in Cha. To restore the legal construction and thus to rebut the equitable construction

Devises.

parol testimony ~~testimony~~ of the testator's intention is admissible; this may be explained by the following case — A makes a will giving many legacies, and amongst others a legacy to B. and constitutes B. his Ex^tor — After all the debts and legacies are paid there being a residuum and no residuary legatee — the legal construction respecting this residuum is that it belongs absolutely to B. the Ex^tor the equitable construction is that he holds this residuum as trustee for the testator's next of kin and will be compelled to distribute it among them — Now to rebut this equitable construction; parol evidence may be admitted to prove that it was the intent of the testator; that the Ex^tor should have the residuum absolutely and thus restore the legal construction —

X. In no case can parol proof be admitted to remove the legal construction and place in its room the equitable one.

XI. Parol testimony is never admissible unless the construction intended to be produced by it stands well with the will. This may be explained by the case in Viz. where the testatrix gave a legacy to the 4 children of E.B. The fact was E.B. had 6 children 2 by her first husband and four by the last; parol evidence was admitted that the testatrix intended that the 4 children by the last husband should have the legacy, for this does not contradict the will but stands well with it — On the

same will there was an other legacy not to the 4 children but to the children of E.B.— Parol testimony was offered to shew the testator intended the 4 children by the last husband, but this was rejected, for the word children includes all the children and to restrain the construction to the four children would not stand well with the will. &

XII. Parol testimony is admissible to prove that a legacy was ~~intend~~ intended in satisfaction of a preceding agreement—

Of Executory Devises and Remainders.

In the first place Mr Reeve thinks it necessary to make some observations on the difference between Wills and Deeds by way of introducing the subjects of which he intends to treat.

In the beginning of the lectures on Devises it was observed that the polar star in constructing wills was the intention of the testator. It is a rule of prime importance that the intention is always to govern in devises, provided it be consistent with the rules of law— Now if the latter part is to be understood in a certain sense, there would be no distinction between wills and deeds. But this is not the case. In deeds technical terms are adhered to; in wills the intention of the testator, provided such intention can be ascertain-

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ed. In wills the words "fee simple" "all my estate" "to one forever" &c. will convey a fee simple, but not so in deeds the word "heirs" must be inserted.

The rule that the intention is to govern in wills provided it be consistent with the rules of law, does not refer to technical terms used to convey property, but to the nature of the estate given. Now if the estate is of such a nature as can be given, no matter what terms are used it will pass, if it is fairly the intention of the testator that it should pass. If a man wishes to extend his ~~wishes to extend his~~ dominion after his death, and thereupon devises to one, and after him to an other &c. &c. from generation to generation it will not be good, for altho' the intentation of the testator is plain and indisputable yet it is an illegal one.

There seems to be a deviation from this rule in the case of Executory Devises for in these an estate can be given inconsistent with the rules of law, which is in direct opposition to the rules of law. An executory devise differs from an estate in fee, an estate in tail, an estate for life and an estate for years. It is in fact a new kind of estate, it was anomalous.

Remainders and executory devises agree in this that they are estates to be enjoyed at some future period. The right in one case is vested by deed. In the other by will. But let it be remarked, that a remainder can be as well created by will as

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by deed. As where a man by deed gives to A. an estate for years rem=mainder to B. and his heirs forever. So may he do it by will.

A man cannot give an estate by deed to commence 20 years hence because it would be no remainder, but he could by de=vise. If it is an estate which would not be good by deed, it will be an executory devise. Whenever an estate is subject to technical rules it will be a remainder otherwise an executory devise.

No estate in remainder made to commence "in futuro" will be good unless supported by a particular estate. It is the very prop on which remainders ~~which remainders~~ rest. An estate is given to A for years remainder to B. ~~for years~~ in fee here the inte=rest passes entirely out of the grantor a devisor to the particular estate man, and the remainder man, and the latter will have all the privileges and government of the estate, while in pos==session of tenant for years, as the grantor would have had, had the reversion remained in him. This is a vested remainder because the estate is already in the hands of the remainder=man and cannot be defeated, but where the estate of the remainder man rests on some uncertain event, a person so that it may or may not vest it is a contingent remainder. As where B. gives an estate to A. for life remainder to B's eldest son the remainder is contingent. Because B. may never have a son. but the moment he has one the remainder is ~~—~~
who has no sons

no longer contingent but vested. B.'s son must be born during A.'s life otherwise the remainder can never vest for it is a rule that it must vest during the continuance of the particular estate or "eo instanti" that it determines. If A. merely conveys an estate to B. for life, the reversion in fee as a matter of course, still remains in him. &c

To make either a contingent or vested remainder, there must always be a precedent estate.

It is a rule that a contingent remainder cannot be created upon any estate less than a life estate, because the freehold must pass out of the grantor and vest in some one at the time of granting and when it rests upon a contingency there is no one in whom it can vest, for a freehold estate cannot vest in one for years.

Another maxim is of so much importance as to demand attention. It is that in a deed a fee simple cannot be limited upon a fee simple which may be done in a devise. As where B. gives by a deed an estate to A. and his heirs, but provided A. dies before he arrives to the age of 21 years, then to B. and his heirs - it will be void, but in a will it will be good.

One thing farther as to the difference between deeds & wills - By deed no man can create a remainder in a lease for years i.e. in personal property, because in law a life estate is greater than an estate for years but in a will this can be done.

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Mr Reeve has thought it unnecessary to refer to any authorities for what he has laid down but recommends 2 Bl. 166. and Wood-=eroone lectures as containing all the important matter.

Of Remainders.

"A remainder is an estate limited to take effect, and be enjoyed after an other estate is ended" As where J.S. grants an estate to B. for years remainder to B. and his heirs forever. Now J.S. has parted with all his estate and interest, and has vested a remainder in B, the remainder is in fact a present estate, but to be enjoy=ed in future.

Where an estate is greater than for years Livery of Seisin is necessary to pass it. To assume there is no actual delivery of seisin=livery of seisin at this day in Eng. but the delivery of the deed is symbolical of it.

A remainder can never be limited upon an estate which does not pass out of the grantor at the time of creating the particular estate. but it is not essentially necessary that this estate vest in the remainder man, for it may be a contingent remainder, but it must vest in the remainder man during the continuance of the particular estate or "eo instanti" that it determine, if it does not it can never vest.

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A remainder may be limited to take effect upon an uncertain person or upon an uncertain event. The uncertain person or event must be "potentia propinqua" a probable contingency & not "potentia remota" (remotissima), a remote possibility.

1st. As to an uncertain person — An estate to A. for life remainder to B's eldest son, now the event of B's having a son is "potentia propinqua. But an estate to A. for life remainder to B's eldest ~~son~~ grandson C. having neither son nor grandson is "potentia remotissima".

An estate to A. for life and to the heirs of B. B. being not in esse — this is also "potentia remotissima". To B's eldest son named John is remote also. If this estate is void in its creation it can never have effect altho all the contingencies happen —

2. As to the uncertainty of the event — An estate to A. for life remainder over to B. provided B. survives ~~them~~ him, now if B. dies before A. the remainder is gone and can never vest. These remainders are contingent —

If this particular estate, which is said to support the remainder, is destroyed before the remainder vests it can never after vest, for when the foundation stones are swept away the fabric itself must fall.

In case of contingent remainders the tenant for life may destroy the remainder by forfeiting or surrendering up his own estate as well as by his death before the remainder

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man is in esse. This has introduced the practice practice of constituting trustees to support contingent remainders as where there is an estate to A. for life remainder to B. if he survives A. Now if A. does any act by which he forfeits the estate it will destroy destroy the remainder, but B. to prevent this forfeiture, has a clause inserted in the grant that "D shall be a trustee to pre=serve the contingent remainder during the natural life of A. this is in fact throwing an other prop under the building and was first known in the reign of Car I.

Mr Preme defines that the doctrine of remainders has been called difficult - But it is difficult only as learning to be a shoe maker is difficult - it is merely mechanical and requires only attention.

Of Executory Devises.

An executory devise properly so called is an estate created by a will to be enjoyed at some future period, and it must be such an estate as cannot fall under the denomination of remainder.

1st. The first difference between an executory devise and a remainder, is that no particular estate is necessary to sup=port the former - As an estate to commence on the marriage of a feme sole - An estate to A. and her heirs on the day of her

marriage — This is a free hold made to commence in futuro and upon a contingency too — An estate unknown at Com. law, for there every free hold must commence in presenti if even it is to be enjoyed in futuro — This practice of creating estates to commence in futuro was made entirely by the courts — The example above stated is not an executory devise because created by will, but because it is made to commence in futuro without any estate to support it. 2 Bl. c. 176.

2 A second difference between an ex. dev. and a rem^r is that in the former, a fee simple or any ~~other estate~~ life estate may be limited after a fee simple upon some contingency — As if a man devises lands to A. and his heirs, but if he dies before the age of 21, then to B and his heirs. This remainder tho' void by deed is good by ~~way~~ way of ex. dev. — But in both of these kind of ~~de~~ ex. dev. the contingencies ought to be such as to happen within a reasonable time, because otherwise perpetuities are created which the law abhors. As estate to B. & his heirs, but if no heirs 100 years hence then to C. and his heirs — this would be ill —

The length of time which was first determined that the contingency should happen in, was during a life or lives in being — Afterwards the time was extended: As in case of a devise to the eldest son of B. — Now in the first instance the eldest

son must have been born before the death of B. in the second instance it was extended to the time wt at which B. should arrive at the age of 21. which might be 21 years after the death of B.: in the third place and finally the period was extended to a life in being which was ~~the life~~ the life of the mother and the subsequent infancy of her son — Making in the whole a life in being 21 years and 9 months afterwards. The reason of this ~~9 months~~ 9 advance of 9 months wt was when the father might die and leave the mother enceint with the son to whom the property was devised on his arrival at the age of 21. This time was usually allowed as the usual course of gestation. 2 Bl. 177.

3. By executory devise a remainder may be created in a term of years — or a leasehold for years may be given to one man for his life & afterwards limited over in remainder to an other, which could not be done by deed because in law a life estate is esteemed a greater estate than ~~one~~ even one for 1000 years. As ex. gra. A. may give a life estate to B. in a term for years with remainder over to C. but in order to avoid perpetuity which the law abhors with its concomitant inconveniences to society, it is settled that the remainder man must be in esse at the time of the limitation — otherwise a man might extend his dominion from one generation to an other for 1000 which would be creating perpetuities — But all the remainder men must be ~~in esse~~ in esse so that all the candles may be titled &

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burning at once. Such remainder may not be limited to take effect unless upon such such contingency as must happen (if at all) during the life of the first devisee. 2 Bl. c. 178.

Statute of Connecticut.

The statute of Con. places remainders and executory devises upon one and the same footing. Such a stat. however Mr Preme believes has not been adopted in the states generally.

This stat of Con. declares that all kinds of estate may be given by deed or will to any person or persons in esse or to the immediate descendants of those in esse. Which completely does away the maxim of law that an estate cannot be made to commence in futuro. By stat. of Con. an estate may be given to ~~B and his heirs or~~ to the youngest child of B. not born. A man can go no farther. He cannot have dominion beyond the second generation.

It shall just be observed in this place that there has been a great deal of foolishness in the books about the legal construction given to the words "dying without issue" in an estate. B ~~and~~ and if he should die without issue to. then to C. If there never had been a lawyer every body would have known how to have construed these words. for the

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meaning of them would naturally have been at the time of his decease without issue ~~of his body~~ ~~without extending to further children~~ ~~future children or generations i.e. without extending it to grand children great grand children &c.~~ — But according to the legal construction a man may die without issue an hundred or a ~~thou~~ thousand years after his ~~death~~ natural death. This law however remains untouched in Eng. but appears to be ridiculed and spurned at in some of our courts —

Cases exemplifying the nature of Remainders and Executory Devises.

1st A. devises an estate to B. his wife for life, remainder over to C. This is a good remainder vested.

2d A. devises to B. his wife for life, remainder to the heirs of his eldest son — his son then having no heirs — Now this is a good contingent remainder, & no executory devise, for it has the properties of a remainder —

3d A. devises an estate to B. for life, remainder over to C. & his heirs forever; but if my son D. pays to my son C. £500 within 3 months after his mothers death then to D. and his heirs. This will be a good executory devise for a fee is limited after a fee — 10 Mod. 420. Also

(a) This distinction arises only where the person is incertain

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4th This case is a leading one — A. devises to B. and his heirs forever, But if B dies without issue living A, then to C. and his heirs forever Cro. Jam. 590. This was an ex. dev. —

5th A devises to the heirs of J.S. at J.S.'s death — ex. dev. 1 Salk. 226 Cro. Eliz. 478.

One word in this place with respect to the distinction between a contingent and vested remainder — A remainder is not contingent because it may never vest, for a remainder vested in interest may never vest in possession — A distinction may be drawn in this way — If there is a capacity in the remainder man (that is if he is in esse) to take at the time of the creation of the remainder, it will be a vested remainder, but if he is not in esse he will not have capacity to take and therefore it will be a contingent remainder — (a)

Of devises conferring Power to executors and other persons to sell the Testator's property —

A man not only has power to devise his estate himself, but he may confer of or give away that power either by deed or will —

This power is given most commonly to executors but yet it may as well be transferred to others —

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Sometimes a mere naked authority to dispose of the property is given – at ~~an~~ other an interest is coupled with such authority –

1st As to the first – Where there is a devise that his Executors shall sell, that they may sell, or that they have power to sell &c. it confers but a naked authority and any conveyance made by such ~~authority~~ executors will be valid – Some see that the law from indulgence to testators permits them to have some sort of dominion over their property even after their death – Co. L. 342. Comp. 464. Co. Lit. 113 –

2d As to the second – Where I devise to my Exors to sell my property, they have not only a power but an interest i.e. the legal title is in them – this distinction Mr Reeve considers as unfounded, for he supposes that the object in each would be the same, and so he thinks it would be determined in Con. when the question comes fairly up.

1st If there is a mere naked authority devised to a man to sell, it can be considered in no other light than as a power of attorney and of course if this power is given to two Exors a conveyance cannot be made by one alone, because powers of attorney are construed strictly always; the conveyance must be executed jointly except it is otherwise provided in the will. The Exors do not take as Exors but as appointees – But it has

been determined, that in case that in case there are three Exrs. if one dies the other two may convey or sell —

Also that where a man has given power to his 4 sons in law to sell — A joint conveyance i.e. a conveyance of them all only will be good. But where such power was given to his sons in law, a conveyance by any two will be good — And if this power is given to any of them then the act of one will be sufficient —

It is a principle estabished in Cha. that whoever has such a power to sell or dispose of property may be compelled so to do by the legatees or Creditors filing a bill in equity for that purpose. But the appointees are by no means compellable to act, the case above supposes them to have accepted which if they once do they are ~~compellable to act~~ obliged to act —

It is frequently the case that men devise their lands to be sold without ~~mentioning~~ mentioning by whom. In such cases it has been determined that the Exrs. may sell and the sale ~~may be void~~ will be valid. But now if they do not sell and the courts have no authority to compel them to do it — The court will ~~It frequently happens~~ appoint the heir to sell, and if he will not do it then the court will appoint a trustee for the purpose — 1 Ves. 304 —

All the difference between a naked power and one

Devises.

with an interest, i.e., that in the latter case the Ex^tors or appointees, have in them the legal title, until they do sell, and therefore they may enjoy the estate until that time, but they will be compelled to sell –

Where an estate is given to Ex^tors to be distributed, or to Ex^tors to maintain children, in both of these cases they have an interest as well as a power –

Anciently there was a practice for the testator to devise his property to his Ex^tors to dispose for the good of his soul – In this case it seems the heir had a right to claim, which if he did not, the Ex^tor would be sure to sell, for it was pleasing for him to have the money to use as he pleased –

Observations applicable to the states wherein the stat. of Uses regulates Wills and Devises –

Before the stat. of Uses 27 Hen. 8. Where A. gave an estate to B. for the use of C. C. the cestui que use would compel B. the cestui que trust to pay over to him the rents profits &c. The practice of granting these trust estates (as has been already been observed in a treatise on considerations) arose from the frequent forfeiture of estates during the civil wars between which contended Eng. The owners of lands would convey them to obscure

a 2d. Ser. 8/3.
1 Vern. 79.
167—

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purpose to the use of themselves or their friends to save them from forfeiture — this practice brought along with it great confusion, and immense inconveniences, which induced the enaction of the stat. of Uses, declaring the man to whose use lands were given should not only have the use but the possession, not only the beneficial but the legal interest. a fee simple was vested in the cestuy que use.

But suppose an estate devised to B. for the use of C. would this stat. operate upon it? It certainly would operate to vest both the title and possession in C. the "use man" In these states however when the statute of uses has no force, this would not be the case. If then this stat. entes up by the roots all such estates as there, given in trust, how happens it that in these countries where this very stat. opps operates, that there are so many trust estates? How is this stat. waded for certainly it must be if trust estates are allowed? ~~at all~~ It was defeated by connecting a practice in the will or conveyance. As where A. gives an estate to B. for the use of C. in trust for D. the latter of whom was to be profited by the grant, and this practice has introduced the whole doctrine of trust estates.

Should a man then attempt to create a trust estate by a devise to ~~be~~ B. for the use of C. "the stat. would cut it of as quick as lightning" In Con. where the stat. of

uses is rendered nought by an other stat: this would ~~create~~ constitute a good trust estate.

Thus has been a most useful statute made entirely — but it is justice to observe, that courts of Cha. have so amply regulated trust estates, that little danger need ever be appre=hended from them —

Of Property devisable under the Eng. Stat. of Devises.

It is apparent from the Eng. stat. that no property is de=visable in Eng. except property held in fee simple — But to en=able a man to devise it is not necessary that he should be in actual possession; for a man may devise his remainder in fee; so a reversioner may devise his reversion; But a man in order to devise his must be seized — The fact is that in case of a reversion the seizen of the reversioner is tenant or lessor, in his seizin; so of the remainder man —

But if a man is actually dissessed i.e. ~~that is~~ turned out of possession he cannot devise the premises of which he is so ~~seized~~ dispossessed —

A man may devise all ~~devise all~~ possible contingent in=terest in the nature of a fee simple.

An estate in jointenancy cannot be devised — Neither

Moor. 860.

Devises.

can an estate tail; nor an estate for the life of the testator, or to be enjoyed by the testator for the life of an other.

Difference in Law. All persons here may devise any estate of which they are possessed except estates tail. A joint tenancy may be devised here. A man need not be seized here to enable him to devise.

How a devise may become Inoperative.

One way in which a devise may become inoperative has already been largely treated of and which will not be taken up again. Mr Keane refers to revocations.

I. First then a will may become inoperative by being ~~now~~ revoked.

III. A will may likewise become inoperative by reason of uncertainty. As where a devise is in these words "to the right heirs of my name and posterity ~~at~~ part and ~~parcel~~ parcel like" Also "all my freehold to my wife for 5 years" and in a codicil made afterwards "if my estate is out of freehold before the 5 years are expired then to C." He

Also devise "to the two best men at White Hall" So also "to the poorest man at ~~Dover~~" so also "to one of the sons of J. S." he having several. In all these cases the will is unintelligible upon the face of it & is inoperative when taken altogether no rational interpretation

can be given to it.

But a will may become inoperative by uncertainty which may arise dehors the will, as where a man gives such an estate to his son John, he having two sons of that name. Now we have already seen that parol proof may be admitted to identify the person and and thereby explain the testator's intention. The will in ~~such~~ ~~cases must be a nullity~~ without it. But if no such proof can be had the devise becomes inoperative.

III. A devise may also become inoperative where the manifest intention of the testator is contrary to or opposed to the policy of the law. Cases of this kind have occurred very frequently. As a devise by A. to B. and his heirs forever, that B. shall not have power to alien the estate. It is a principle ingredient in a fee simple that the owner have power to alien; the intention of the testator is therefore contrary to law. It will be recollected however that this will however by no means render the will void. It will only vitiate the clog thrown upon the estate which is contrary to law. The Devisee will consequently take a fee simple.

So also a devise of an estate to A. and his heirs male forever, will be ~~an intention~~ an attempt to create such an estate as the law knows nothing of. To have devised to the heirs male of the body of A would have been a legal intention, for then an estate tail male would have been created. As the case is stated a fee simple would vest in the Devisee.

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It would also be the same if a man should devise an estate tail to A & the heirs of his body &c prohibiting him from docking such an estate by fine or common recovery.

So also in case of a devise from one generation to an other.

So also where there is a devise of an estate free from Dower.

The cases are opposed to legal policy.

IV. Another set of cases which formerly occurred, and which will be mentioned now for the sake of regularity, which are opposed to legal policy are Where testators having several children devised all their estate to their eldest sons, who would have taken as heirs. It formerly made a great difference whether in such a case a son would take as devisee or heir, for in the latter case the property would have been liable for debts — in the former it would not — But now in either case or in all cases, the property will be liable for the testators debts.

V. A devise may become inoperative by the devisee's waiving it which he may always do — This will very frequently be the case where the legacies or debts will amount to more than the property devised — In such cases devisees will not burden themselves for nothing.

VI. A devisee may have done the very thing in his lifetime, which he devised to have done at the expence of his property after his death — which will always satisfy the will, and render it as to

1 Vern. 95.

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that inoperative — As where a man makes a will and gives £400 out of his personal property to his eldest son for the purpose of building him an house; the remainder of his estate to his other children — The testator does not die so soon as expected, but builds the house for his ~~so~~ son during his life time and then dies there is a satisfaction pro tanto

VII. Devises may be defeated or become inoperative by stat. which subjects the lands devised to the payment of debts.

Who may Devise

All persons were incapable of devising real property before the stat. of wills 32 Hen. 8, except those who lived in places where there were special customs. Before this stat. every person could devise personal property — The statutes of Hen. & ~~Charles~~ gave a power ~~of devising~~ to all persons to devise real property except Infants, Idiots, and persons of non sane memory; these it seems were incapable of devising ~~real~~ personal property at Com. Law, before the statutes —

Feme Coverts had also a positive disqualification to devise by the stat Hen. 8

I. Minors or Infants are ~~proof~~ prohibited on the ground of a want of discretion —

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II & III. Idiots, and persons of non-sane memory are also disqualified on the ground of incapacity, or want of direction to direct the course in which their property ought to go. Whether persons have sufficient capacity is to be investigated by the production of evidence and to be left to the determination of the triers. A man is not to be excluded on the ground of Idiocy &c merely upon the belief or suggestion of one man. The court or jury being the triers must judge for themselves.

If a man has capacity to take due and proper care of his property and affairs, and to manage them with ordinary direction, he is not a subject of disqualification within the stat. However an a man to enable him to devise must not only be capable of answering familiar questions, but he must be of a <u>sound disposing mind</u>.

IV. As to the power of <u>Feme Covert</u> pow to devise. Feme Coverts are disqualified positively to devise by the stat. of W. 4. notwithstanding some contend that this disqualification arises from an incapacity to devise at Com. Law.

But can feme coverts devise in those states where this stat. is not adopted in the great question. In Com. it has been determined that they can devise property which they have to their sole and seperate use. that they may devise any <u>real</u> property which they may bring into marriage as well as all other kinds

of property which they had to their sole and seperate use, without the consent of the husband, and Mr R. considers this a correct decision —

It was first determined in the court of probate in the affirmative — It was then taken to the superior court and there determined in the negative — and from thence to the supreme court of errors where it was determined in the affirmative & upon application to the Legislature to have an other trial it was refused to be granted. In the council there was but one dissenting voice —

This to be sure was a novel question and the principle determined was condemned by lawyers generally upon the ground that feme covertes are under the coersion and controll of their husbands — hence it is infered that they cannot do no valid act —

Now this determination if it is correct in Con. it is correct in all the states where no positive disqualification has been interposed by stat.

In Con. there is nothing in the stat. which Mr R. supposes incapacitates feme covertes. By the words of the stat. "Infants, Idiots, and persons of non sane memory and all others legally incapacitated" are disqualified — Does this stat. then include a operate upon feme covertes? Is coverture a legal disqualification?

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If they were intended by the ~~stat. why~~ Legislature why were they not mentioned or named? Nothing could have been easier and nothing more natural than to have done this. If no other persons except those mentioned are legally incapable and then no others are incapacitated, and these words "all others legally incapacitated" are merely words of abundant caution. There are persons between under duress or the absolute control of others or persons under overpower who could not devise but feme coverts are certainly not intended under this class.

Having attempted to shew that the stat. of Lon. does not either literally or virtually exclude or disqualify married women, the question remaining is could feme coverts devise their personal property at Com. Law for there no one could devise real property. If in Eng. by the Com. Law they could devise their personal property, it is agreed on all hands that they can devise real property here for one state regulates both.

If there can be a case so circumstanced that a married woman can devise her personal property (I mean property in her own right entirely independent of her husband) without interfering in the least with the marital or with the husband's legal rights, then we can see no obstacle to prevent her from devising her such property. If in devising she would in such a case effect her husband's marital ~~rights~~ or legal rights

it is agreed that she cannot devise –

But let me ask if she has property to her sole and sep=arate use where has the Com. Law restricted her devising it. Why should the husband have control over it, where it can never possibly go to him? Why are here her wishes not to be gratified as well as his, wherein it will not injure him or effect his marital rights in any the most possible degree?

But there are only arguments which if against law must yield, however forcible or convincing? But is this the case?

1st. The opponents of this determination say (in Com.) that the wife cannot contract or devise alone because she and her husband are one – this is truly ridiculous; for if they are one how comes it to pass that the husband can contract, & devise &c without the concurrence of the wife?

2d. It is also said, that the wife has no will of her own this is not true in any sense – If she has no will why is it necessary that she should join her husband to convey her a fee simple – this assent must be had to to pass his life estate. So her assent is wanting to pass her fee simple – Besides when the wife is guilty of an offence is she not as a subject to be pun=ished as he is? most certainly –

3d. The opposers of the principle refer to the cases in the books wherein it is said the will of a married woman is good, with

Kirb. rep. 145.
438. adams
vs. Kellogg.

Lyndw. 170

the will or assent of the husband - therefore say they, it would not not be good without their assent - The answer ~~is ready~~ to this is ready - All these cases without a solitary exception are where the wife willed ~~away~~ away the property of the husband, which do not at all, reach the case of a will of her own property -

4th In Reeve's history, there is a note signed by Bracton ~~say~~ saying generally that feme covertes can not devise - The meaning of Bracton is obvious - they cannot generally devise because they ~~cannot~~ have not generally property to their sole and seperate use -

Both Lindewoode and Arch-bishop Stafford, think it very strange that there should be a question with respect to a feme covert's having power to devise her seperate property -

5th It was anciently the ~~co~~ practice to endow ad ostium ecclesia, with ~~person~~ personal property & Lindewoode maintains that the wife could devise this property - These cases striking into antiquity, shew beyond a doubt what was then considered as law by men of eminence -

6th Before the Stat. Car. 2 which stat. makes the ~~stat.~~ husband administrator of the wife and therefore gives him her chose in action for the payment of debts her debts - Before this stat. if the wife had chose in action never meddled with collected or reduced to posses-

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sion by the husband during coverture she could devise them — the incapacity to do this now arises from an incapacity introduced by the stat. above quoted —

If this is correct she may devise as executrix, property which she holds *in autre droit* as exec.tr distinct from her husband — It has been so determined.

The membership cases of separate property which continually arise in Mr Reeve's opinion unequivocally decide this question —

In every book it is found that a feme covert may do what she thinks proper with her separate property — Why then may she not devise it? She cannot in Eng. on account of the positive disqualification by the stat. then. and not because an incapacity arises from coverture. If Coverture disqualified her, then she would not be at liberty to sell or convey her property, which we find she continually does under the protection of the law; and without affecting the husband's marital rights — Her property we know must be subject to the husband's courtesy, and so *vice versa* his to her dower.

Why then (is asked) may femes covert not devise in those states where no disqualification is interposed by stat.? The only specious reason against the position is that feme covert are under the coercion and control of their husbands — and even this upon a slight examination vanishes — For if this argument proves

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anything it proves too much were their reason to have its full extent, then feme covert would be incapable to convey their real property, which they in fact do every day for surely this coercion would operate in sales, and conveyances as well as devises if it vitiated one it would vitiate the other.

If it is said that when women devise they are generally weak in body and mind and therefore more subject to coercion, the answer is at hand this does not apply to their power to devise but strikes solely at the policy and validity of permitting death-bed dispositions. The question is can feme covert devise when well in health have they the power then? Mr R. is in the affirmative.

This is indeed analagous to the law respecting the power of feme covert to contract. If a husband is exiled or banished, the wife can certainly contract.

The ground on which the husband was joined his wife in the disposal of her property, is uniformly to give up his own rights, and not her.

But say the opposer of this principle if feme covert may devise against the will of their husbands why may they not convey against their will. (There is no stat. disqualifying them from conveying) The fact is that by their conveying she would by this deprive him of the usufruct of her property during life, which he has an

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indisputable right to, and a privation of which would effect his marital rights.

Besides this would contradict a settled maxim that a freehold cannot be made to commence in future, which would be the case if her conveyance should have validity without his assent; She could not then be permitted to create a remainder because it would contradict an other maxim of the Eng. Law that a remainder must commence at the time of creating a particular estate which is said to support it.

The Com. Law then does not disqualify feme covert to devise. They have power therefore so to do in all the states where in they have not disqualified them by stat.

There is a principle in Eng. that the person devising must have power to devise at the time of making the will, or it will never afterwards be valid. So where a married woman devises and afterwards being discovert republishes the devise now she being incapacitated at the inception of her will her discoverture will not render it good or valid.

There was anciently a practice in Eng. that where men had good house wifes, they would set apart for them a certain portion of personal property called their rationable part, which they were permitted to devise and such will was good now this was not because Coverture was a disqualification for if

it had been the convenience or aprint of the husband, could not have made a will good when in its inception it was bad and void.

The following are some of the principal authorities connected with the foregoing principle — 1 Reeve's Hist. Eng. Law 317. 111. 104. 4 Co. 73. Bracton 60 Lyndewoode 178. year book 5 & VI 31 & 39. Co. Brooke devise 27. 34. Ca. Cas. 219. 376. 2 Ver. 190. 1 Bro. Ch. 10. 2 Ver. 75. 1 Ver. 309. 5 Ch. 8 Atk. 709. Pr. Ch. 205. 1 P. Wms 126. 2 P. W. 316. 1 Vern. 245. 2 Vern. 253. 1 Wood. 211. 218. Moore 846. Anderson 92. Roll ab. 608. 912 —

Duress, Imprisonment, and Ne are disqualifications to a man devising — Where a devise has been under any of these, the courts will go greater lengths to set aside wills than they will deeds —

Whenever a man is sick on his death bed is over importuned, to procure respite from tearing, has made a will according to the desires of those who have importuned him, it will be set aside — As where a woman teased her husband to favor a particular child —

All the disqualifications of devisors have been mentioned — It remains to say that all persons who are seized of real property legally may devise, and so may all persons who have an equitable claim or seizen for it is all the seizen which such a claimant can have —

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Of Devisees.

It is almost impossible to find a man who cannot be a devisee. It is clear that all persons may, unless they are under some stat. or civil disability or disqualification.

A devise may be made to a person in venter sa mere; therefore assent of Devisee have nothing to do with ~~with devisees~~ devisee. A devisee cannot however be compelled to take the property devised to him. In grantee the property granted ~~was~~ vests immediately; therefore the noise made about the assent of the grantee is naught.

Property devised vests instanter upon the death of the devisor.

Coverture is no disqualification of a devisee: It is said the husband may agree or assent to her taking as devisee. It is acknowledged he may do so during his life, but as an estate they will may be made to commence in futuro, he cannot hinder her taking as devisee after his death.

It was once a question whether a husband could devise to his wife. It was said he could not because he and she were one, to have devised to her would have been devising to himself which would be absurd.

2 Ver, 260

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But when it was considered, that the estate devised was only to commence after his death, it put an end to this "ownership" so frequently talked about —

A man may also grant lands to his wife thro' any medium. As to convey to an other person and he immediately to convey to ~~an other~~ her — This is now the practice in Lon.

But in Eng. the stat. of uses has given to husbands a more direct way of conveying to their ~~wives~~ wives — As a man conveys to Tom Stokes for the use of his wife this is by the deed an immediate conveyance to his wife —

It may be seen then that there is no ~~so~~ such difference between devises and deeds as some is pretended —

Aliens — It has been said that Aliens cannot be devisees — It is true that aliens cannot legally hold property devised; but yet in case of a devise the interest does pass out of the devisor to the Alien. He certainly can take as devisee, tho' the property would be forfeited upon office found i.e. as soon as he was legally proved to be an alien —

Illegitimate children — It has been said that illegitimate children being "filii nullius" or "filii populi" cannot take as devisees — By the same manner of reasoning we may prove they were never born —

The fact is that they may always take by grant or

1 P. W. 529.

1 Atk. 410.

Pow. Rev. 82.

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devise, after they have obtained a name by reputation altho' they can not before —

Suppose a man devises to his eldest son, and his eldest son is illegitimate, would he take? No, the law presumes no illegitimacy, but that he intended his eldest son born in lawful wedlock.

But suppose a man makes an estate in remainder to his eldest son unborn whether illegitimate or not, the first if illegitimate could not take having ~~none~~ no name by reputation — But a devise to his illegitimate children by their names would be good. If however he had 3 illegitimate children born and three unborn, the former the former only would take. If he should not say "to his sons" yet if to them by name, and they had obtained names by reputation the devise would be good —

An estate cannot either be devised or granted to illegitimate children unborn —

In a devise where an estate is made to commence "in futuro" it is not necessary so particularly to describe a devisee but in deeds which must vest an estate "in presenti" the grantee must be particularly described.

As a devise to A on his marrying a woman of a certain name, now this devise will pass the property on such marriage —

In devises uncertainty as to the person who is to take

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is by no means uncommon — As devise to one of a certain man's children who shall first get married —

Concerning persons not in esse — A great deal has been said as to persons ~~in esse~~ not in esse taking by deeds and wills — Deeds and Devises do vary in this particular; for an estate may be devised generally to persons unborn, if not too far extended. No estate can be created by deed to vest in future except in the case of contingent remainders —

In ventre sa mere — An estate conveyed to one in ventre sa mere, will not be valid unless by way of remainder. In case of death the civil law distributed the estate alike ~~alike~~ to one in ventre sa mere as with others —

Formerly a devise to a child when born (Verba de presenti) would be good; but to an unborn (Verba de futuro) child, not so — but now in both cases valid — A disgraceful question —

It is a rule if you can collect from the will that the testator intended a future disposition to take effect at the birth of the child, it will be a good devise — As devise "if the child should be born"

Civil persons — An estate may not only be given to natural but to civil persons as Exts. sheriffs &c &c and any words in the will which will direct as to the person intended, will be sufficient altho' no name be mentioned — It depends

1 Ver. 84.
1 Atk. 759.
765.

1 L.J. Ry.
203.

1 Dev. 234.
372. 2 Dev.
311. Hab. 94.

REEVE'S
LECTURES

V